90-1658

Supreme Court, U.S.
FILED
APR 29 1991
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No. 91-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HBA EAST LIMITED, ET AL.,
Petitioner

v.

JEA BOXING COMPANY, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Is the failure to give notice of a default judgment hearing a violation of Defendant's right to due process under the Fourteenth Amendment to the United States Constitution once Defendant has made an appearance in the case?

2. Can the right to complain of a due process violation be waived prior to the time when the Texas Supreme Court, following a United States Supreme Court's decision, holds that the right to due process is available under the circumstances at issue?

3. Did Petitioners appear in the case?

LIST OF ALL PARTIES

Petitioners/Defendants are:

HBA East, Limited
HBA East, Inc.
Ring Network, Inc.
Ring Sports Promotions, Inc.
Round One Productions, Inc.
585 Stewart Avenue
Garden City, New York 11530

Jeffrey D. Levine
33 Ingold Drive
Dix Hills, New York 11746

There are no other parent companies or subsidiaries.

Respondents/Defendants are:

JEA Boxing Company, Inc.
Pinehill Investments, Inc., d/b/a
Houston Boxing Association
5005 Riverway, Suite 500
Houston, Texas 77056

There are no other parent companies or subsidiaries.

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No. 91-

HBA EAST LIMITED, ET AL,
Petitioners,

v.

JEA BOXING COMPANY, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Petitioners, HBA East Limited, HBA East, Inc., Ring Network, Inc., Ring Sports Promotion, Inc., Round One Production, Inc., and Jeffrey D. Levine ("Levine") file this Petition for Writ of Certiorari to the Supreme Court of the State of Texas and ask this Court to vacate the judgment, render judgment for Petitioners on the questions presented, and remand the case to the trial court for a trial on the merits.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Supreme Judicial District of Texas sitting in Houston, Texas, is reported at 796 S.W.2d 534. App. B. The Supreme Court of the State of Texas denied Petitioners' Application for Writ of Error, notating writ denied. App. A. The denial of Petitioners' Application is not officially reported. The judgment rendered by the trial court is not officially reported. App. C.

JURISDICTION

Petitioners' Application for Writ of Error was denied by the Supreme Court for the State of Texas on January 23, 1991. App. A. Respondents' Motion for Rehearing of Application for Writ of Error was overruled on February 20, 1991. App. D. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1:

> . . . no State shall make or enforce any law which shall abridge the privileges or amenities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

Respondents filed their Original Petition on March 3, 1987, seeking the dissolution of an alleged partnership with Petitioners, all rights and interest in the alleged partnership's assets, and actual and punitive damages. App. E.

All Petitioners had been served with the lawsuit by March 6, 1987. On March 27, 1987, before their answers were due in the Harris County District Court, HBA East, Inc., Round One Production, Inc., and Levine filed Petitions for Chapter 11 bankruptcy reorganization in the Eastern District of New York. (HBA East, Inc., Round One Production, Inc., and Levine will at times be referred to herein as the "Bankruptcy Petitioners", the other Petitioners will at times be referred to as the "Non-Bankruptcy Petitioners".) During the course of the bankruptcy proceedings, $175,000 was escrowed into the registry of the bankruptcy court by order of that court. On June 3, 1988, the bankruptcy judge dismissed Petitioners' Petition.

On June 27, 1988, Petitioners removed the Texas state action to federal court. App. F. The Honorable Lynn N. Hughes of the United States District Court of the Southern District of Texas, remanded the case to the Harris County District Court on June 30, 1988. App. G. Before signing the remand order, Judge Hughes directed that the $175,000 in escrow in New York be deposited in the registry of the federal court, which they were. Although a certified copy of Judge Hughes' remand order was filed with the Harris County District Clerk, Petitioners never received written notice that the remand order had been filed in Harris County.

At a hearing held on Saturday, April 1, 1989, the trial court rendered a default judgment against Petitioners, jointly and severally, for $2,215,595 in actual damages, $6,645,785 in punitive damages, and post-judgment interest. In addition, the judgment awarded Respondents the $175,000 plus interest which had been on deposit in the federal court registry, provided for the dissolution of the partnership upon which the underlying lawsuit was based, and awarded Respondents all rights and interest to

the partnership assets. App. C. The default judgment, approved by Respondents' counsel, correctly stated that Petitioners had appeared in the case. Even though they had made an appearance, Petitioners received no actual or constructive notice of the default judgment hearing and consequently were not represented at such hearing.

On April 28, 1989, Petitioners filed their Motion for New Trial, asserting that the default judgment was void because their answer was not yet due according to Texas Rule of Civil Procedure 237a when judgment was rendered. App. H. Rule 237a states that a defendant's answer is due 15 days after he receives notice of an order of remand. The trial court denied Petitioners' Motion for New Trial on May 10, 1989. App. I. On August 25, 1989, Petitioners filed their appeal bond and appellate brief with the court of appeals, asserting the same points of error they had raised in their Motion for New Trial. App. J. At the times the Motion for New Trial as well as the appellate brief were filed, the particular application of the constitutional right to due process upon which Petitioners premise this Petition had not yet been announced.

It was not until September 20, 1989, that the Texas Supreme Court decided *LBL Oil Company v. International Power Services, Inc.*, 777 S.W.2d 390 (Tex. 1989). *LBL Oil* was the first case in which the Texas Supreme Court applied *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988) to facts identical to those of the present case. The supreme court held that once a defendant has appeared in a cause, he is entitled to notice of a hearing on a motion for default judgment. The court stated that if such notice is not given, and a default judgment is entered, the defendant has been denied due process under the 14th Amendment to the federal constitution.

Prior to *LBL Oil* there had been no suggestion by the courts that the *Peralta* rights were applicable in

Petitioners' circumstance. Therefore, Petitioners were timely in initially raising their due process complaint, based on lack of notice of the default judgment hearing, in their Amended Brief For Appellants filed with the court of appeals on October 2, 1989. App. K.

Petitioners raised the federal question in their first point of error in their Amended Brief. App. K-8. That point of error stated:

> THE TRIAL [SIC] ERRED IN ENTERING A DEFAULT JUDGMENT FOR APPELLEES, AFTER APPELLANTS HAD APPEARED IN THE CASE, WITHOUT NOTICE TO APPELLANTS OF THE HEARING ON APPELLEES' MOTION FOR DEFAULT JUDGMENT, IN VIOLATION OF APPELLANTS' RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. (TR. 129-136)

However, the Court of Appeals found that the Non-Bankruptcy Petitioners had waived their constitutional complaints.[1] App. B. The Texas Supreme Court sanctioned that decision by denying Petitioners' Application for Writ of Error. App. A.

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1. The court of appeals affirmed the trial court's default judgment as to the Non-Bankruptcy Defendants and reversed and remanded that judgment as to the Bankruptcy Defendants. The court held that because the Bankruptcy Petitioners' answer was not yet due when the default judgment was rendered, the judgment was invalid as to them. The court therefore declined to address whether the Bankruptcy Petitioners had waived their constitutional rights as well. App. B. By denying writ, the Texas Supreme Court expressed approval for the court of appeals' decision. App. A.

REASONS FOR GRANTING THE WRIT

This Court has long held that "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and to afford them the opportunity to present their objections." *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 99 (1988); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The default judgment hearing at issue, at which the trial court granted final judgment against Petitioners for more than $8,000,000, was undoubtedly "accorded finality".

However, it was not until *LBL Oil* that the constitutional mandate of *Peralta* was applied to the precise situation at bar by the Texas Supreme Court. As a result of *LBL Oil*, it is clear that the opinion of the court of appeals and the Texas Supreme Court's affirmation of that opinion conflict with the decisions of this Court in *Peralta* and *Mullane* and, for that reason, should be reversed.

A. Respondents' Failure to Give Petitioners Notice of the Default Judgment Hearing Violated Petitioners' Fourteenth Amendment Due Process Rights.

Once a defendant has made an appearance in a cause, he is entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment to the Federal Constitution. At a minimum, the due process clause requires that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Mullane v. Central Hanover Bank & Trust Co.* , 339 U.S. at 313.

Twelve days after the default judgment in question was rendered, Respondents filed not only a Request for Writ of Execution on Petitioners' property, but also an Affidavit for Immediate Execution, seeking expedition of the process. Apps. L and M, respectively. There can be no doubt that the hearing on Respondent's Motion for Default Judgment in this case, in which a judgment of more than eight million dollars was rendered against Petitioners, was a proceeding in which Petitioners were deprived of property rights. Therefore, ". . . notice and hearing must [have] measure[d] up to the standard of due process." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 313. Because Petitioners received no notice whatsoever of the hearing, the standards of due process were not met.

In *Peralta v. Heights Med. Center, Inc.*, 485 U.S. at 99, this Court reiterated the basic premise of the due process clause when it stated, "failure to give notice violates 'the most rudimentary demands of due process of law.'" The facts in *Peralta* were, however, different from the situation with which the Petitioners here were faced. In *Peralta*, this Court held that the rendition of a default judgment violated a defendant's right to due process when the defendant was never personally served with the lawsuit and when he had not appeared before the trial court. The Court held that, under those circumstances, the defendant was not required to show a meritorious defense in order to obtain a new trial.

In *Lopez v. Lopez*, 757 S.W.2d 721 (Tex. 1988), the Texas Supreme Court applied *Peralta* to circumstances differing both from the *Peralta* facts, as well as the facts of the case at bar. In *Lopez*, the defendant had both appeared and answered. The Texas Supreme Court held under those circumstances that the defendant had a constitutional right to notice of a trial regardless of whether he could demonstrate a meritorious defense.

For the first time, in *LBL Oil*, the Texas Supreme Court considered facts which were virtually identical to the facts in this instance and found that the basic premise of *Peralta* applied. The *LBL Oil* court cited *Peralta* in holding that "Once a defendant has made an appearance in a cause, he is entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment to the Federal Constitution." *LBL Oil Co. v. International Power Services, Inc.*, 777 S.W.2d at 390-391.

The court stated that a hearing on a motion for default judgment was the equivalent of a trial setting in that it is dispositive of the case. This holding comports with this Court's ruling in *Mullane* that due process requires notice of any proceeding which is to be accorded finality. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 314. Clearly, the rulings in *Peralta* and *Mullane*, as applied for the first time to the present situation in *LBL Oil*, are controlling and dictate that Petitioner's due process rights were abridged when they were given no notice of the hearing on Respondent's Motion for Default Judgment. For that reason, the judgment in this case must be set aside and the case remanded to the trial court.

B. There Has Been No Waiver of Petitioners' Constitutional Right to Notice of the Default Judgment Hearing.

Petitioners first asserted their constitutional right to notice of the default judgment hearing in their amended brief. That was the earliest possible point at which it was conceivably reasonable to do so. *LBL Oil* was the first case to apply the ruling of this Court in *Peralta* to circumstances wherein a defendant has appeared but is given no notice of a hearing on a motion for default judgment, and judgment is rendered against him at the hearing. Those are the precise facts of Petitioners' case. The *LBL Oil* decision was rendered subsequent to the time that the Motion for New Trial in this case had been denied and the time that Petitioners' brief was due to the court of appeals. Thus, it is incredulous for Respondents to claim that the Petitioners waived their right to due process by failing to assert their constitutional objections at either of those times.

It has been a basic premise of this Court for decades that "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458 (1937). Petitioners could not have waived their right to complain of due process violations based on lack of notice of the default judgment hearing prior to the time that that right was enunciated in *LBL Oil*.

In addressing a waiver argument similar to the one put forth by Respondents before the court of appeals, this Court has held that a party against whom relinquishment of a constitutional right is asserted will not be required to have foreseen the pronouncement of a constitutional right by the courts. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (in which this Court rejected a contention that the

party who was alleged to have waived his constitutional right should have seen "the handwriting on the wall.").

This Court has further held steadfast to the premise that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. at 464. This is particularly true when the constitutional points were "raised early enough so that this Court has had the benefit of some ventilation of them by the courts below." *Curtis Publishing Co. v. Butts*, 388 U.S. at 144. In this instance, Petitioners raised their constitutional claims at the earliest possible opportunity. That timing was sufficient to allow the court of appeals to consider the salient points. The court of appeals and state supreme court had the occasion to determine that Petitioners' constitutional right to due process had been violated and did not do so. This Court should now properly uphold those rights.

C. Petitioners Appeared in the Cause.

Respondents have attempted to convince the appellate courts below that Petitioners made no appearance in this case.[2] Such contentions are absurd given the fact that the default judgment, approved by Respondents' counsel, recited that "Defendants, [Petitioners here] although having made an appearance in this action, failed to answer this action." App. C. Respondents are bound by the findings of the trial court because Respondents failed to object to the finding and failed to appeal that aspect of the judgment. Once the trial court lost jurisdiction, the recital, even if it were erroneous, could not be cured by a nunc pro tunc proceeding. *Stock v. Stock*, 702 S.W.2d 713 (Tex. App.- -

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2. Neither the court of appeals nor the supreme court addressed this issue even though Petitioners had thoroughly briefed the point to both courts.

San Antonio 1985, no writ); *Finley v. Jones*, 435 S.W.2d 136 (Tex. 1969). Furthermore, the record demonstrates that Petitioners did, in fact, appear.

For example, the law firm of Kaye, Scholer, Fierman, Hays & Handler, representing at least three of the Petitioners, filed a letter dated June 14, 1988 with the Harris County District Clerk. App. N. In that letter, Petitioners' lawyers requested several things of the trial court on behalf of HBA East, Inc., Round One Productions, Inc. and Jeffrey Levine, who had filed a Chapter 11 bankruptcy proceeding in New York. Counsel asked that in the event the New York bankruptcy court determined not to transfer the adversary proceeding filed therein, identical to the proceeding filed before the trial court, to a New York federal district court, the letter be deemed to be a request for the removal of the proceeding before the trial court to the Texas federal court. The letter further requested that all pleadings which had been filed in the adversary proceeding before the bankruptcy court, "including the answer," be deemed the duly filed pleadings of the parties in the trial court. Defendants' counsel further requested "that there . . . be a prompt adjudication of the underlying claims asserted by the parties hereto" and specifically asked the trial court to apprise them of the approaches it deemed advisable "in order to achieve . . . the foregoing action."

Additionally, Defendants appeared in this case while it was pending in federal court in response to a motion for contempt and sanctions before the trial court signed its judgment. In fact, Judge Hughes, the federal district judge, stated in a hearing on July 8, 1988 that Mr. Steinberg of the Kaye, Scholer firm made an appearance for Petitioners on June 29, 1988 by participating in a motion hearing by telephone. App. O. At that same hearing, Mr. Montague, Respondents' counsel, agreed with Judge Hughes and further added:

> Mr. Steinberg made an appearance before this Court, Your Honor, and it is absolutely absurd for Mr. Caddell to come in here and try to represent to this court that Mr. Steinberg made no appearance. He was on the pleadings. He talked to you on the telephone about the case in [sic] his representation to [sic] the Defendants. I was sitting in the room when you talked to him.

App. O.

Not only did Mr. Steinberg make an appearance on behalf of Petitioners, but there can also be no doubt that Mr. Caddell, Petitioners' Texas counsel, did as well. To begin with, Mr. Caddell appeared in person at the July 8 hearing. App. O. Secondly, he signed and filed a response to Plaintiffs' Order to Show Cause and attended the hearing on the matter. App. P. Finally, Mr. Caddell noted at that hearing that he had previously spoken to Judge Salazar about a hearing in state court. App. O.

A general appearance is entered whenever the defendant invokes the judgment of the trial court in any way on any question other than that of the court's jurisdiction, without being compelled to do so by previous rulings of the court sustaining the jurisdiction. *Toler v. Travis County Child Welfare Unit*, 520 S.W.2d 834, 836 (Tex. Civ. App.--Austin 1975, writ ref'd n.r.e.); *Smith v. Amarillo Hospital District*, 672 S.W.2d 615 (Tex. App.--Amarillo 1984, no writ). This is true not only in the courts of Texas but also in both state and federal jurisdictions throughout the United States. *Trust Co. Bank v. Tingen-Millford Drapery Co.*, 119 F.R.D. 21 (D.N.C. 1987); *Cactus Pipe & Supply v. M/V Montnartre*, 756 F.2d 1103, 1108 (5th Cir. 1985); *Ragnone v. Wirsing*, 367 N.W.2d 369, 370 (Mich. Ct. App.1985); *Hutchinson v. Brotner-Sherman*

Theatres, Inc., 419 N.E.2d 530, 538 (Ill. Ct. App. 1981); *Iffland Lumber Co. v. Tucker*, 368 A.2d 606, 608-9 (Conn. 1976); *Barber v. Calder*, 522 P.2d 700, 702 Fn. 4 (Utah 1974); *Resident Advisory Board v. Tate*, 329 F.Supp. 427, 430 (D.C. Pa. 1971).

Moreover, even if a defendant attempts to make a special appearance to contest the court's jurisdiction, but does so incorrectly, the defendant will be deemed to have made a general appearance. *Slater v. Metro Nissan of Montclair*, 801 S.W.2d 253 (Tex. App.--Fort Worth 1990, writ denied); *Barber v. Calder*, 522 P.2d at 702, Fn. 4; *Kulbeth v. Woolnought*, 324 F.Supp. 908, 911 (S.D. Tex. 1971). Clearly, according to the facts, and under the law of Texas and numerous other jurisdictions, Petitioners appeared in this case.

Finally, Mr. Montague's certificate of service, demonstrating further his belief that Petitioners had appeared in the case, shows that both Mr. Caddell and Mr. Steinberg were furnished with copies of Plaintiffs' First Amended Petition filed by Mr. Montague in state court before the hearing on the motion for default. App. Q. Although Respondents' counsel had provided Petitioners with notice of all previous hearings and copies of pleadings, he deliberately failed to provide Petitioners with copies of the motion for default judgment or with notice of the hearing set for Saturday, April 1, 1989 on that motion. Consequently, Petitioners were deprived of their constitutional rights under the Fourteenth Amendment to have notice of the hearing so that they could attend and defend themselves. There can be no clearer violation of the constitutional right to due process of law.

CONCLUSION

Petitioners appeared in this case. Having done so, they were entitled to, but did not receive, notice of the

hearing at which a multi-million dollar default judgment was rendered against them. Clearly, Petitioners' due process rights were violated.

Furthermore, Petitioners diligently asserted their constitutional complaints in a timely manner, and thus, did not waive their right to due process. The default judgment against Petitioners should be vacated and the case remanded to the trial court for a full trial on the merits.

Respectfully submitted,

BUTLER & BINION

By:_____

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APPENDICES

APPENDIX A

THE SUPREME COURT OF TEXAS
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John T. Adams, Clerk

January 23, 1991

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RE: Case No. D-0436

Style: HBA EAST, LTD. ET AL.
v. JEA BOXING COMPANY, INC. ET AL.

Dear Counsel:

Both applications for writ of error in the above referenced case were this day denied with the notation, Writ Denied.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca Morin, Deputy

APPENDIX B

OPINION
IN THE
COURT OF APPEALS
FOR THE
FIRST DISTRICT OF TEXAS

NO. 01 -89-00557-CV

HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., and JEFFREY D. LEVINE, Appellants

V.

JEA BOXING COMPANY, INC. and PINE HILL INVESTMENTS, INC., D/B/A/ HOUSTON BOXING ASSOCIATION, Appellees

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On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 87-10167

This is an appeal from a no answer default judgment. We affirm in part and reverse in part.

The defendants and appellants are MBA East, Ltd.; HBA East, Inc.; Ring Network, Inc.; Ring Sports

Promotions, Inc.; Round One Productions, Inc.; and Jeffrey D. Levine. MBA East, Ltd. is a Texas limited partnership. All the other defendants are New York residents that do business in Texas. The plaintiffs and appellees are JEA Boxing Company, Inc. and Pine Hill Investments, Inc., doing business as the Houston Boxing Association.

In 1984, the plaintiffs and defendants formed a limited partnership in Texas, MBA East, Ltd., to promote boxing events. MBA East, Inc. became the managing partner of MBA East, Ltd.

The plaintiffs filed suit in Texas state court on March 3, 1987, alleging that Jeffrey Levine used MBA East, Inc., as his alter ego, to manipulate MBA East, Ltd. and that Levine, through MBA East, Inc., breached his contractual agreement with the plaintiffs by refusing to make accountings. They also claim Levine breached his fiduciary duty to them by self-dealing. The defendants undertook a series of legal maneuvers, including the filing of bankruptcy petitions by some of them and the filing for removal from Texas state court to federal district court. They did not file answers in the state court proceeding until May 10, 1989. Meanwhile, the plaintiffs sought, and were granted on April 1,1989, a default judgment against the defendants.

On appeal, the defendants assert that the trial court erred in: (1) entering a default judgment against them after they had appeared without notice to them of the hearing on the plaintiffs' motion for default judgment; (2) entering a default judgment against them before their answer was due under TEX. R. Civ. P. 237a; and (3) ordering the district clerk to release funds from the court's registry to the plaintiffs.

The following dates are procedurally significant:

1987 March 3 — The plaintiffs filed suit in Texas state court.

March 5 — MBA East, Inc. was served.

March 6 — MBA East, Ltd., Ring Network, Ring Sports Promotions, Round One Productions, and Jeffrey Levine were served.

March 27 — MBA East, Inc., Jeffrey Levine, and Round One Productions filed petitions for chapter 11 bankruptcy in New York.

March 30 — The answer deadline in the Texas state court suit.

1988 June 3 — The New York bankruptcy court dismissed the bankruptcy suit.

June 27 — All the defendants filed petitions for removal from Texas state court to federal district court in Texas.

June 29 — The defendants attended the hearing on remand in federal district court; the court announced it would remand the case to Texas state court.

June 30 — Federal district court remanded the case to Texas state court.

June 30 — The clerk of federal district court notified parties of the remand order.

June 30— The defendants filed suit in New York state court.

July 8 — Federal district court in Texas held a hearing on contempt motion; at the hearing, the defendants' attorney acknowledged that the defendants knew of the remand.

July 19 — The defendants received another notice of the remand: A copy of the letter sent to Texas state court about the remanded case and funds in the registry of federal district court in Texas.

November 4 — The New York state court dismissed its case and acknowledged the case pending in Texas state court.

1989 March 29 — In Texas, the federal district court's order of remand was filed in the Harris County District Clerk's office.

April 1 — Texas state court entered a default judgment against all the defendants.

April 10 — Texas state court ordered the clerk to pay all funds in the registry to the plaintiffs.

April 28 — The defendants filed a motion for new trial in Texas state court.

May 10 — All the defendants filed their original answers in Texas state court.

May 10 — Texas state court denied the motion for new trial.

In considering the defendants' second point of error, we note that there is a distinction between those who filed for bankruptcy and those who did not.

Ring Network, Ring Sports Promotions, and HBA East, Ltd. (the nonbankruptcy defendants) did not file for bankruptcy. Therefore, they did not have the benefit of the automatic stay afforded debtors who file petitions under the federal bankruptcy laws. *See* 11 U.S.C.S. sec. 362 (Law. Co-op. 1985 & Supp. 1990). The answer date for the nonbankruptcy defendants in the Texas state court suit, therefore, was the first Monday following the expiration of 20 days after service of citation, or March 30, 1987. TEX. R. CIV. P. 99(c), 237. The answers filed by the nonbankruptcy defendants on May 10, 1989, were over two years too late. Moreover, the deadline for their answer expired before they filed their petition for removal to federal court, so they are unable to use TEX. R. CIV. P. 237a to extend their answer deadline.

We overrule the second point of error with respect to the nonbankruptcy defendants.

HBA East, Inc., Levine, and Round One Productions (the bankruptcy defendants) filed for bankruptcy in New York three days before their answer date in the Texas state court suit. The bankruptcy filings resulted in an automatic stay for the bankruptcy defendants, and their time to file answers in the state lawsuit was tolled until the bankruptcy cases were dismissed or closed. *See* 11 U.S.C.S. sec. 362 (c)(2)(A), (B) (Law. Co-op. 1985).

After conducting extensive hearings, the bankruptcy court in New York, on June 3, 1988, dismissed the defendants' bankruptcy as brought in bad faith. The bankruptcy defendants' time to answer resumed 30 days after June 3, 1988, or on July 3, 1988. *See Howard v. Howard*, 670 S.W.2d 737, 739 (Tex. App. San Antonio 1984, no writ); 11 U.S.C.S. sec. 108 (c) (Law. Co-op. 1985 & Supp. 1990). Therefore, the new answer date for the bankruptcy defendants in the Texas state court suit was July 6, 1988.

On June 27, 1988, all the defendants filed a petition for removal of the Texas state court suit to federal district court. On June 29, the federal court announced that it was going to remand the case to Texas state court. The court also ordered the $175,000, which was escrowed in the bankruptcy court in New York, to be deposited with the federal district court until the case was remanded to Texas state court. On June 30,1988, the federal district court signed a remand order. The clerk of the federal district court furnished the Texas state court a certified copy of the remand order on March 28,1989. *See* 28 U.S.C.S. sec. 1447(c) (Law. Co-op. 1989).

Rule 237a of the Texas Rules of Civil Procedure provides:

> *When any cause is removed to the Federal Court* and is afterwards remanded to the state court, *the plaintiff shall file a certified copy of the order of remand* with the clerk of the state court *and* shall forthwith *give written notice of such filing* to the attorneys of record for all adverse parties. *All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer.*

TEX. R. CIV. P. 237a (emphasis added). Rule 237a establishes a "start" date from which the 15 day answer period may be computed. The new answer date for the bankruptcy defendants in the Texas state court suit became the date 15 days after their receipt of the notice of the filing of the remand order from the plaintiffs. The defendants claim that they never received written notice of such filing from the plaintiffs. This claim is uncontradicted by the plaintiffs. The bankruptcy defendants rely on rule 237a to argue that their answers were not due at the time the default judgment was granted. They contend that the failure to comply with the provisions of rule 237a renders the default judgment void.

The plaintiffs interpret rule 237a as only requiring notice to a defendant that a case has been remanded from federal court to state court. They contend that, because the bankruptcy defendants received multiple notices of the remand, no further notification was required and there has been no violation of the rule.

The plain wording of rule 237a gives a defendant 15 days from the receipt of the plaintiff's notice of the filing of the order of remand to file an answer in

state court, without reference to whether the original removal was provident. Were we to hold that actual notice of an order of remand was sufficient to cause the 15-day period to commence, not only would we render meaningless the language of rule 237a, but we would cause confusion among practitioners concerning the "start" date from which the 15-day answer deadline is determined after a cause is remanded to state court from federal court. A discussion of rules 239 and 237a of the Texas Rules of Civil Procedure and the procedures for removing causes from state to federal court illustrates our concerns.

Rule 239 of the Texas Rules of Civil Procedure reads as follows:

> Upon such call of the docket, or *at any time after a defendant is required to answer*, the plaintiff may in term time take judgment by default against such defendant if he has not previously filed an answer, and provided that the citation with the officer's return thereon shall have been on file with the clerk for the length of time required by Rule 107.

TEX. R. CIV. P. 239 (emphasis added). In the case before us, the default was taken in "term time," and the record shows that the citations with the officers' returns were on file with the clerk for the time required by TEX. R. CIV. P. 107 and that answers were not filed before the default judgment was entered. The only element remaining to be satisfied under rule 239 is the date by which the bankruptcy defendants were required to file an answer. Rule 237a dictates the bankruptcy defendants' filing deadline.

The procedure for removal of a cause from state to federal court is set forth in 28 U.S.C.S. sec. 1446 (Law. Co-op. 1989). In part, that section reads:

> Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, *which shall effect the removal* and the *State court shall proceed no further unless and until the case is remanded.*

28 U.S.C.S. sec. 1446(d) (emphasis added). Under the federal statute, removal occurs when the proper filings are done in the federal district court and state court. If the removal procedure is defective, or if the federal district court lacks subject matter jurisdiction, the remedy is remand. *See* 28 U.S.C.S. sec. 1447(c) (Law. Co-op. 1989); *see also Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97-98(1921). Until remand, however improvident a removal may have been, a cause remains removed. *See* 28 U.S.C.S. see. 1446(d). It should.be noted that an order remanding the cause may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. 28 U.S.C.S. sec. 1447(c). When causes are erroneously removed, costs may be taxed against the defendant. *See American United Life Ins. Co. v. Franklin*, 97 F.2d 76, 77 (8th Cir. 1938); *Schmidt v. NOW*, 562 F.Supp. 210, 215 (N.D. Fla. 1983).

In this case, the cause was removed to federal court and quickly remanded back to the state court. Under rule 237a, it then became the plaintiffs' obligation

to file a copy of the remand order with the clerk of the state court and to give written notice of such filing to the defendants. It should be noted that the plaintiff controls the timing of the filing and the written notice. Written notice must be accomplished in person, by registered mail, or in any other way directed by the court. TEX. R. CIV. P. 21a. Delivery in person or by registered mail generates a dated receipt from which the 15-day period can be calculated. A defendant then has 15 days after receipt of such written notice to file its answer. It is worth emphasizing that rule 5 of the Texas Rules of Civil Procedure allows the trial court in its discretion, "for cause shown," to enlarge a period during which notice may be given under the Rules. There is no comparable rule permitting a trial court to shorten any notice period under the rules.

The Texas Supreme Court has stated that the Texas Rules of Civil Procedure have the same force and effect as statutes. *Missouri Pac. R.R. v. Cross*, 501 S.W.2d 868, 872 (Tex. 1973). While the rules are to be liberally construed to ensure a fair and equitable adjudication of the rights of the litigants, their plain meaning cannot be ignored. *Heard v. Heard*, 305 S.W.2d 231, 235 (Tex. Civ. App.—Galveston 1957, writ ref'd). When a court interprets a statute, it must give effect to all the words of a statute and not treat any statutory language as surplusage if possible. *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987); *see also City of Houston v. Morgan Guar. Int'l Bank*, 666 S.W. 2d 524, 529 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.), *cert. denied*, 469 U.S. 1213 (1985).

Rule 237a gives a defendant 15 days from the receipt of a plaintiff's notice of remand to file its answer. *See, e.g., Knutson v. Ripson*, 346 S.W.2d 424, 425 (Tex. Civ. App.—Amarillo 1961), *aff'd on other grounds*, 354 S.W.2d 575 (Tex. 1962). For example, a plaintiff can file a copy of

the order of remand in the state court and serve notice on the defendant on the same day the order is issued by the federal court thereby compelling the defendant to file its answer within 15 days, a comparatively short period of time.

Reading rules 237a and 239 together, we conclude that a default judgment cannot be granted against a defendant following remand of a case from federal to state court until 15 days have expired from the defendant's receipt of the remand notice from the plaintiff.

We sustain the second point of error with respect to the bankruptcy defendants.

In point of error one, the defendants contend the trial court erred in entering a default judgment after they had appeared in the case because they were not given notice of the hearing on the motion for default. In light of our disposition of point of error two, we will not address this point of error as it relates to the bankruptcy defendants, but must do so with respect to the nonbankruptcy defendants.

The nonbankruptcy defendants failed to urge this point of error before the trial court in their motion for new trial. To preserve a complaint for appellate review, a party must present to the trial court a timely request, objection, or motion. TEX. R. APP. P. 52(a); *see Davis v. Davis*, 734 S.W.2d 707, 710 (Tex. App.—Houston (1st Dist.] 1987, writ ref'd n.r.e.). Nor does the fact that the nonbankruptcy defendants allege that the lack of notice of the hearing was a violation of their due process rights under the fourteenth amendment to the United States Constitution affect their waiver of this point of error. Constitutional issues must first be raised in the trial court. *See Feinman v. State*, 717 S.W.2d 106, 115 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

We overrule the first point of error with respect to the nonbankruptcy defendants.

In point of error three, the defendants argue that the trial court should not have ordered the immediate release of funds from the court's registry to the plaintiffs. The defendants argue that, because the default judgment was premature and therefore void, the trial court erred in releasing the funds.

We have already decided that the default judgment was improper in relation to the bankruptcy defendants. Therefore, the trial court's order transferring the funds in its registry to the plaintiffs was also improperly granted.

We sustain the defendants' point of error three.

Therefore, we affirm the judgment with respect to the nonbankruptcy defendants, MBA East, Ltd., Ring Network, and Ring Sports Promotions; reverse the judgment with respect to the bankruptcy defendants, MBA East, Inc., Round One Productions, and Levine, and remand to the trial court; and order the plaintiffs to return the funds released to them by the trial court to its registry.

/s/ D. Camille Dunn
D. Camille Dunn, Justice

Justices Bass and O'Connor also sitting.

Publish. TEX. R. APP. P. 90.

Judgment rendered and opinion delivered
True Copy Attest:

/s/ Kathryn Cox
Clerk of Court

APPENDIX C

NO. 87-010167

JEA BOXING COMPANY, INC., AND PINE HILL INVESTMENTS, INC. d/b/a HOUSTON BOXING	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	157TH JUDICIAL DISTRICT

JUDGMENT

BE IT REMEMBERED that on this day came on to be heard the above styled and numbered cause wherein JEA Boxing Company, Inc. and Pine Hill Investments, Inc. d/b/a Houston Boxing Association are Plaintiffs and HBA East, Ltd., HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine are Defendants. The Plaintiffs appeared by their attorney of record and announced ready for trial. The Defendants were duly and legally cited to appear and answer.

Citation was served according to law and returned to the Clerk where it remained on file for the time required by law.

The Defendants, although having made an appearance in this action, failed to answer this action.

After considering the pleadings on file herein, the evidence presented by the Plaintiffs at trial, and all other things material to this action, it is the opinion of this Court that the Defendant, Jeffrey D. Levine, used the corporate Defendants, HBA East, Inc., Round One Productions, Inc., Ring Network, Inc., and Ring Sports Promotions, Inc. and the limited partnership, HBA East, Ltd., as a sham to perpetrate a fraud on the Plaintiffs; that the Plaintiffs have been substantially damaged by the Defendants' fraudulent conduct; that the amount of actual damages, exclusive of interest, sustained by the Plaintiffs to which they are entitled to recover, jointly and severally from the Defendants, is $1,420,769.00; and that in addition to the actual damages sustained, the Plaintiffs are entitled to recover prejudgment interest on these damages in the amount of $794,826.00.

Further, it is the opinion of this Court that all boxing promotional rights contracts in existence or made in the name of any of the Defendants during the course of the Plaintiffs partnership relationship with the Defendants that include, but are not limited to, boxing promotional rights contracts with Carl Williams, Tony Tucker, Hector Camacho, Vincent Burgese, Roger Mayweather, and Tony Martin, as well as all sponsorship contracts in existence or made in the name of any of the Defendants during the course of the partnership relationship with the Plaintiffs that include, but are not limited to, the Cibco Importing Company (Tecate) sponsorship contract, are the property of the Limited Partnership, HBA East, Ltd.; and that dissolution of the Partnership should be ordered by this Court and all rights and interests in these Partnership contracts should be wholly assigned to the Plaintiffs.

Further, it is the opinion of this Court that the Plaintiffs are entitled to the $175,000.00, and interest, if any, on deposit in the registry of the United States District

Court for the Southern District of Texas in the case styled JEA Boxing Company. Inc. and Pine Hill Investments, Inc. d/b/a Houston Boxing Association v. HBA East. Ltd.. HBA East. Inc.. Ring Network. Inc.. Ring Sports Promotions. Inc.. Round One Productions. Inc.. and Jeffrey D. Levine, C.A. No. H-88-2214, in the United States District Court for the Southern District of Texas--Houston Division; and that the $175,000.00plus interest should be transferred to this Court's registry; and that upon transfer the Plaintiffs are entitled to withdraw immediately that amount from this Court's registry without further order of this Court.

Finally, it is the opinion of this Court that the dishonest, deceptive and fraudulent conduct of the Defendant, Jeffrey D. Levine, in his business dealings with the Plaintiffs; his use of the corporate fiction through the vehicle of the Defendants, HBA East, Inc., Round One Productions, Inc., Ring Network, Inc., and Ring Sports Promotions, Inc., as a sham to perpetrate fraud on the Plaintiffs; and the further use of his position of control as Managing Partner over the Defendant, HBA East, Ltd., entrusted in him by the Plaintiffs, as a further vehicle to defraud the Plaintiffs, all of which was to their substantial damage and warrants the imposition of substantial punitive damages against the Defendants.

It is, therefore,

ORDERED that the Plaintiffs, JEA Boxing Company, Inc. and Pine Hill Investments, Inc. d/b/a Houston Boxing Association, have and recover from the Defendants, Jeffrey D. Levine, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and HBA East, Ltd., jointly and severally, the sum of $2,215,595.00;

ORDERED that the business of the Defendant, HBA East, Ltd., be dissolved;

ORDERED that the Plaintiffs, JEA Boxing Company, Inc. and Pine Hill Investments, Inc. d/b/a Houston Boxing Association, have and recover jointly and severally from the Defendants, Jeffrey D. Levine, HBA East, Inc., Round One Productions, Inc., Ring Network, Inc., and Ring Sports Promotions, Inc., all of the rights and interests in the boxing promotional rights contracts and sponsorship contracts in existence or made during the course of the Plaintiffs' partnership relationship with the Defendants;

ORDERED that the Plaintiffs have and recover from the Defendants, Jeffrey D. Levine, HBA East, Inc., Round One Productions, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., and HBA East, Ltd., jointly and severally, punitive damages in the amount of $6,645,785.00.

ORDERED that the Plaintiffs, JEA Boxing Company, Inc. and Pine Hill Investments, Inc. d/b/a Houston Boxing Associations have and recover from the Defendants, Jeffrey D. Levine, HBA East, Inc., Round One Productions, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., and HBA East, Ltd., jointly and severally, interest on the total amount of this judgment at the rate of ten percent (10%) per annum from the date of judgment until paid;

ORDERED that the Defendants, Jeffrey D. Levine, HBA East, Inc., Round One Productions, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., and HBA East, Ltd., pay all costs of court in this behalf expended for which let execution issue if not timely paid; and

ORDERED that the Plaintiffs are allowed such writs and processes as may be necessary in the enforcement and collection of this judgment. It is further

ORDERED that the Plaintiffs, JEA Boxing Company, Inc. and Pine Hill Investments, Inc. d/b/a Houston Boxing Association, are entitled to all monies on deposit in the registry of the United States District Court for the Southern District of Texas in the case styled JEA Boxing Company. Inc. and Pine Hill Investments. Inc. d/b/a Houston Boxing Association v. HBA East. Ltd.. HBA East. Inc.. Ring Network. Inc.. Ring Sports Promotions. Inc., Round One Productions. Inc., and Jeffrey D. Levine, C.A. No. H-88-2214, in the United States District Court for the Southern District of Texas--Houston Division; that the Clerk of that Court transfer this amount to the registry of this Court, which amount includes $175,000.00 and all interest accumulated thereon; that upon transfer and deposit in this Court's registry that the Clerk pay out the entire amount, plus any interest accumulated thereon, to the Plaintiffs without further order of this Court, and that the amount paid be credited against the total amount of this judgment.

SIGNED this the 1st of April, 1989.

/s/ Felix Salazar, Jr.
JUDGE PRESIDING

APPROVED:

VINSON & ELKINS

/s/H. Dixon Montague
H. Dixon Montague
State Bar No. 14277700
1001 Fannin Street
3200 First City Tower
Houston, Texas 77002-6760
(713) 651-2086

ATTORNEYS FOR PLAINTIFFS,
JEA BOXING COMPANY, INC. AND
PINE HILL INVESTMENTS, INC.
d/b/a HOUSTON BOXING ASSOCIATION

APPENDIX D

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 20, 1991

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Bank Plaza
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Houston, TX 77002-5008

Ms. Linda K. McCloud
Vinson & Elkins
3200 First City Tower
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Ms. Penelope E. Nicholson
Vinson & Elkins
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Houston, TX 77002-6760

RE: Case No. D-0436

Style: HBA EAST, LTD. ET AL.
v. JEA BOXING COMPANY, INC. ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

John T. Adams, Clerk
by /s/ Courtland Crocker, Deputy

APPENDIX E

NO. 87-10167

JEA BOXING COMPANY, INC.,AND PINE HILL INVESTMENTS,INC. d/b/a HOUSTON BOXING ASSOCIATION	§	IN THE DISTRICT COURT OF
V.	§	HARRIS COUNTY, TEXAS
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	157TH JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW the Plaintiffs, JEA Boxing Company, Inc. ("JEA Boxing") and Pine Hill Investments, Inc. ("Pine Hill"), and bring this cause of action against the Defendants, HBA East, Ltd., a Texas Limited Partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine. In support of this action, the Plaintiffs would show this Honorable Court and jury the following:

I.

The Plaintiff, JEA Boxing Company, Inc., is a Texas corporation duly authorized to conduct business within Texas, and maintains its principal place of business in Houston, Harris County, Texas.

The Plaintiff, Pine Hill Investments, Inc. d/b/a Houston Boxing Association, is a Texas corporation duly authorized to conduct business within Texas, and maintains its principal place of business in Houston, Harris County, Texas.

The Defendant, HBA East, Ltd., is a Texas Limited Partnership duly authorized to conduct business within Texas, and maintains its principal place of business in Garden City, New York. HBA East, Ltd. has conducted business in Texas since its effective date of existence in January, 1985, through and at the substantial direction of its Managing Partner, HBA East, Inc. HBA East, Ltd. may be served with process by serving Manager Partner, HBA East, Inc., through its registered agent, CT Corporation System, 811 Dallas, Houston, Texas 77002.

The Defendant, HBA East, Inc., ostensibly is a New York corporation duly authorized to conduct business within Texas, and maintains its principal place of business in Garden City, New York. Since its incorporation, HBA East, Inc. has regularly conducted business in Texas, primarily in Harris County, Texas, through its president and sole shareholder, Jeffrey D. Levine. HBA East, Inc. may be served with process by serving its registered agent for service, CT Corporation System, 811 Dallas, Houston, Texas 77002.

The Defendant, Ring Network, Inc., ostensibly is a New York Corporation and does not maintain an office or regular place off business in Texas and, thus, does not

have a registered agent for service of process in Texas. However, Ring Network has entered into contracts with residents of Texas to be performed in whole or in part in Harris County, Texas, which contracts are involved in this action. Accordingly, Ring Network has appointed the Secretary of State of Texas as an agent to accept service of process in its behalf. Copies of Plaintiffs' Original Petition should be forwarded to Ring Network, Inc. in care of Jeffrey D. Levine, 585 Stewart Avenue, Garden City, New York 11530.

The Defendant, Ring Sports Promotions, Inc., ostensibly is a New York corporation and does not maintain an office or regular place of business in Texas and, thus, does not have a registered agent for service of process in Texas. However, Ring Sports Promotions has entered into contracts with residents of Texas to be performed in whole or in part in Harris County, Texas, which contracts are involved in this cause of action. Accordingly, Ring Sports Promotions, Inc., has appointed the Secretary of State of Texas as agent to accept service of process in its behalf. Copies of Plaintiffs' Original Petition should be forwarded to Ring Sports Promotions, Inc., in care of Jeffrey D. Levine, 585 Stewart Avenue, Garden City, New York 11530.

The Defendant, Round One Productions, Inc., ostensibly is a New York corporation and does not maintain an office or regular place of business in the State of Texas and, thus, does not have a registered agent for service of process in Texas. However, Round One Productions has entered into contracts with residents of Texas to be performed in whole or in part in Harris County, Texas, which contracts are involved in this action. Accordingly, Round One Productions has appointed the Secretary of State of Texas as its agent to accept service of process in its behalf. Copies of Plaintiffs' Original Petition should be forwarded to Round One Productions, Inc. in

care of Jeffrey D. Levine, 585 Stewart Avenue, Garden City, New York 11530.

The Defendant, Jeffrey D. Levine, is a resident of the State of New York. However, Levine regularly conducts business in Houston, Harris County, Texas, individually and in the name of the corporate defendants named above, which corporate defendants are merely the alter ego of Levine. Accordingly, Levine has appointed the Secretary of State of Texas as his agent to accept service of process in his behalf. Copies of the Plaintiffs' Original Petition should be forwarded to Jeffrey D. Levine at 585 Stewart Avenue, Garden City, New York 11530.

II.

In the latter part of 1984, Jeffrey D. Levine traveled to Houston, Texas, to meet with Pine Hill in an effort to convince it to enter into a partnership arrangement with him or, alternatively, a corporation over which he exercised control. The proposed partnership's purpose was to promote boxing events in New York and New Jersey and in such other places as agreed upon by the partners. At this meeting, Levine, acting in his individual capacity and as corporate representative of Ring Network, Inc., Ring Sports Promotions, Inc., and Round One Productions, Inc., made various representations, which have later proved to be false, as a material inducement to get Pine Hill to enter into this partnership arrangement. Believing all of that which it was told at this meeting by Levine to be true, Pine Hill agreed to the partnership arrangement and began spending time and money to put the partnership together. Pine Hill would not have entered in to this partnership arrangement if it had known of- the falsity of Levine's representations. These false representations have substantially damaged Pine Hill.

III.

In December, 1984, Levine formed the Defendant, HBA East, Inc., to act as a general partner in the partnership with Pine Hill. Although Levine has acted in the corporate name of HBA East, Inc. in promoting various boxing events and in other related activities, Levine has never preserved the corporate character of HBA East, Inc. HBA East, Inc. is merely the alter ego of Levine. Levine and HBA East, Inc. are used interchangeably throughout this pleading. Where one of these parties is named, the allegations are meant to extend to each.

IV.

Effective January 31, 1985, HBA East, Inc. and Pine Hill entered into a limited partnership agreement to promote boxing events in the name of HBA East, Ltd., a Texas limited partnership. A true and correct certified copy of the Limited Partnership Agreement creating HBA East, Ltd. is attached hereto and made a part hereof as Exhibit "A". This limited partnership agreement was later amended to admit the Plaintiff JEA Boxing as a second general partner and to name the Defendant, HBA East, Inc., as the Managing Partner of the Limited Partnership. A true and correct certified copy of the amended limited partnership agreement is attached hereto and made a part hereof as Exhibit "B". However, even before the creation of HBA East, Ltd., it was agreed between Pine Hill and HBA East, Inc. that their partnership relationship would be conducted substantially in accordance with the same terms and conditions later memorialized in the limited partnership agreements.

V.

As Managing Partner of HBA East, Ltd., HBA East, Inc. is restricted from engaging in any business activity in competition with the business and activities of HBA East, Ltd. or °that would in any way be detrimental to the partnership or constitute a partnership opportunity. Thus, all business transactions in which HBA East, Inc. has participated in the field of boxing promotions since January, 1985, are for the benefit and belong solely to HBA East, Ltd. Not only was this agreement contained in the limited partnership agreements attached hereto, this agreement was also the agreement among all the parties to this action even before the limited partnership was created. It has now been discovered that HBA East, Inc. has acted in breach of both its contractual agreement and its fiduciary relationship established between the parties to this action, the result of which is great and has substantially damaged the Plaintiffs.

VI.

At the requests of HBA East, Inc., Pine Hill has repeatedly sent substantial sums of money to HBA East, Inc. in order to fund the promotion of various boxing events and to generate revenues for the benefit of the limited partnership since January 1, 1985. The limited partnership agreement requires HBA East, Inc., as Managing Partner of the limited partnership, to account for all moneys received and expended by the limited partnership as well as to account for and to keep the other partners informed of all contracts, business opportunities, and other advantageous business relationships established for the partnership's benefit. Even though the Plaintiffs have made repeated requests to HBA East, Inc., through Levine, to provide such an accounting and other reporting, HBA East, Inc. has repeatedly and adamantly refused to make such an accounting. It has now been discovered that

funds that were forwarded by Pine Hill to HBA East, Inc. have been commingled in other accounts and have been used for the own self-dealing of HBA East, Inc., Levine, and other corporations and business entities over which Levine maintains control in breach of HBA East, Inc.'s contractual relationship with and fiduciary obligations owed to the Plaintiffs. Further, HBA East, Inc.'s actions and that of Levine's in this regard amount to a fraud practiced on the Plaintiffs. This conduct has caused substantial damage to the Plaintiffs.

VII.

HBA East, Inc. is contractually obligated by the limited partnership agreements to allow each of the other partners a reasonable opportunity to inspect, copy, and audit all books, records, contracts, and other documents that affect the partnership's business. The Plaintiffs have made repeated requests to HBA East, Inc. to examine these documents to determine the financial posture of the partnership's business as well as all business opportunities that may affect the business. HBA East, Inc. has repeatedly refused the Plaintiffs the opportunity to make this investigation although it has on numerous occasions recognized the Plaintiffs' right to do so. This conduct constitutes a breach of the contractual agreement HBA East, Inc. has with the Plaintiffs as well as the fiduciary obligations owed to the Plaintiffs. In an effort to achieve justice for the Plaintiffs so that they may determine the exact amounts owed them by the Defendants and, further, to discover the extent of the fraud and misrepresentations practiced on them, it is necessary that the Court appoint an auditor to make a complete audit of all of the Defendants' books, records, and other documents that may have a bearing, directly or indirectly, on the business or business opportunities of the partnership.

VIII.

HBA East, Inc. has breached its agreement with the Plaintiffs in their partnership arrangement with them by self-dealing for its own benefit through Levine. HBA East, Inc. has solely used the invested capital contributions of the Plaintiffs to fund this self-dealing. HBA East, Inc. has made boxing promotion and other contracts in its own name solely for its own benefit when those contracts should have been made in the name of HBA East, Ltd. for the benefit of all partners in the partnership. First, boxing promotion contracts with various fighters such as Tony Tucker, Carl Williams, Vincent Burgese, Roger Mayweather, Tony Martin, and Hector Camacho were made in the name of HBA East, Inc. (or in Levine's name individually or in the name of one of his corporate alter egos) with no intention of letting the Plaintiffs, as partners, receive their rightful share of and benefits from those contracts. Second, HBA East, Inc. has made contracts with various hotels in Atlantic City, New Jersey, and other cities in its own name and for its own benefit substantially relying on the funding and contacts of the Plaintiffs, as partners, to secure these contracts. Third, HBA East, Inc. has made contracts with Madison Square Garden in its own name and for its own benefit substantially relying upon the funding and contacts of the Plaintiffs, as partners, to secure these contracts. Fourth, HBA East, Inc. has made contracts with various television networks and video reproduction companies in its own name and for its own benefit substantially relying upon the funding and contacts of the Plaintiffs, as partners, to secure these contracts. Never did HBA East, Inc. inform the Plaintiffs that these contracts 'were being made in its own name; to the contrary, it repeatedly misled the Plaintiffs into believing the contracts-were made in the partnership's name and/or for its benefit. However, HBA East, Inc. now disavows the existence of any limited partnership arrangement with the Plaintiffs and refuses to allow the

Plaintiffs to receive their rightful share of the benefits of each of these contracts, business opportunities, and advantageous business relationships. This conduct amounts not only to a breach of its contractual arrangement with the Plaintiffs but also fraud. The Plaintiffs have suffered substantial damages by reason of the Defendants' conduct in this regard.

IX.

All of the contracts, potential contracts, business opportunities, and advantageous business relationships made by HBA East, Inc. (or by Levine individually or in the name of one of his corporate alter egos) with fighters, hotels, television networks, video companies, and other groups and corporations connected, directly or indirectly, to promotion or boxing events belong to and are the sole property of the partnership, whether it be found to be a general or limited partnership. HBA East, Inc., nevertheless, has received all of the revenues from these contracts and used them solely for its own personal benefit and for the benefit of Levine. Not only is this a breach of the limited partnership agreement, it is a breach of the fiduciary responsibilities HBA East, Inc. and Levine owe to the Plaintiffs. The Defendants' conduct in this regard has caused the Plaintiffs substantial damage.

X.

All contracts made and business opportunities developed by HBA East, Inc. since January 1 1985, are the property of HBA East, Ltd. These include promotional contracts with boxers, hotels, casinos, television networks, video production companies, and various other corporations and business. entities. Nevertheless, HBA East, Inc. has tortiously interfered with those contracts to the disadvantage of the partnership and, more particularly, the Plaintiffs' investment in the partnership. The Plaintiffs

by reason of this interference has suffered significant damage, and if this conduct continues, will suffer further damage.

XI.

HBA East, Inc. and HBA East, Ltd. conspired to breach their contractual and fiduciary obligations owed to the Plaintiffs as stated above for the ultimate benefit of HBA East, Inc. and Levine. This conspiratorial conduct has caused and continues to cause the Plaintiffs significant damage.

XII.

The Plaintiffs are entitled to declaratory relief in this action from the Court, declaring that cause, at law and in fact, exists for the dissolution of the partnership between the Plaintiffs and HBA East, Inc. by reason of the Defendants conduct alleged hereinabove. Further, pursuant to the Uniform Declaratory Judgments Act, the Plaintiffs are entitled to all of their attorneys' incurred in connection with this action to effect such a dissolution.

XIII.

It is necessary that a receiver be appointed to take possession of and responsibility for the assets of HBA East, Ltd. and HBA East, Inc. as well as any other corporation or business entity over which Levine exercises control that has received funds, directly or indirectly, from the Plaintiffs; to manage and operate the partnership business established between the parties to this action; to collect accounts receivable; to keep a true, complete, and accurate record of the receipts of the partnership business; to pay all approved creditors of the partnership; and to pay to Plaintiffs all sums due under the partnership agreement. If a receiver is not appointed, because of the Defendants

conduct stated hereinabove, the partnership business and the assets thereof are in danger of being' taken, removed, materially injured, or destroyed by persons who have no right to compromise the value of those assets to the Plaintiffs' detriment.

XIV.

By virtue of the wrongful actions taken by the Defendants in the past and the irreparable harm that would most likely occur in the future if these actions were allowed to proceed as before, the Plaintiffs request that this Court enjoin the Defendants from transferring any of the assets possessed by HBA East, Inc., Levine, or any one of his corporate alter egos unless transferred directly to the Plaintiffs, to a receiver appointed by the Court, or to one agreed upon among the parties to this action.

XV.

By virtue of the misappropriations of funds and fraudulent misrepresentations made by the Defendants, the Plaintiffs are entitled to recover and seek to recover in this action punitive damages to deter the Defendants from engaging in similar activities in the future and to provide an example to others who may seek to engage in the same egregious conduct as the Defendants have in this cause.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs, JEA Boxing Company, Inc. and Pine Hill Investments, Inc., pray that the Defendants, HBA East, Ltd., a Texas Limited Partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine, be summoned and required to answer the Plaintiffs' Original Petition; that the Plaintiffs recover their damages arising from the above enumerated contractual breaches and fraud practiced on the Plaintiffs jointly and severally from the

Defendants; that the Plaintiffs receive all of their rightful interests in various promotional contracts made in the name of any one of the Defendants; that the Defendants account to the Plaintiffs in full for the expenditures of funds in the operation of' HBA East, Ltd. and HBA East, Inc.; that the Defendants pay restitution to the Plaintiff, Pine Hill, for all monies invested in HBA East, Ltd. and funded through HBA East, Inc.; that the Plaintiffs recover all consequential damages sustained by them by reason of the Defendants' breaches of contract and fraud practiced on the Plaintiffs; that Plaintiffs recover all lost profits that they have sustained by reason of the Defendants' breaches of contract and fraud; that Plaintiffs recover punitive damages from the Defendants; that Plaintiffs recover prejudgment and post-judgment interest from the Defendants in the maximum amount provided by law; and that the Plaintiffs recover all costs of court and have such other and further relief to which they may be justly entitled.

Respectfully submitted,

VINSON & ELKINS

/s/H. Dixon Montague

H. Dixon Montague
State Bar No. 14277700
Walker W. Beavers
State Bar No. 01998900
3200 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
(713) 651-2086

ATTORNEYS FOR PLAINTIFFS, JEA BOXING COMPANY, INC. AND PINE HILL INVESTMENTS, INC. d/b/a HOUSTON BOXING ASSOCIATION

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEA BOXING COMPANY, INC.,AND PINE HILL INVESTMENTS,INC. d/b/a HOUSTON BOXING ASSOCIATION	§	
V.	§	C. A. NO. H-88-2214
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	

NOTICE OF PETITION FOR REMOVAL

TO: The Judges of the United States District Court:

Notice is hereby given that on June 27, 1988, Jeffrey D: Levine, et al., Defendants in the above entitled action, filed in the United States District Court for the Southern District of Texas, Houston Division, a Petition for Removal of the above entitled action to the United States District Court from the Harris County District Court, 157th Judicial District, Texas, pursuant to 28 U.S.C. Section 1441, together with a cash bond, conditioned as required by law. Copies of this bond and petition are attached hereto as Exhibits "A" and "B" and served herewith.

Notice is further given that on June 27, 1988, the above named Defendant filed a copy of said Petition with a copy of the bond with the Clerk of the Harris County District Court, as required by law.

DATED June 27, 1988.

Respectfully submitted,

/s/Michael A. Caddell
Michael A. Caddell
SDTA No. 7426

The Park in Houston Center
1331 Lamar, Suite 1070
Houston, Texas 77010-3027
(713) 751-0400

OF COUNSEL:

Arthur Steinberg
Kaye, Scholer, Fierman,
Hays & Handler
425 Park Avenue
New York, NY 10022
(212) 836-8000
Caddell & Conwell
1331 Lamar, Suite 1070
Houston, Texas 77010-3027

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Petition for Removal has been forwarded to all counsel of record by certified mail, return receipt requested on this the 27th day of June, 1988.

/s/Michael A. Caddell

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEA BOXING COMPANY, INC.,AND PINE HILL INVESTMENTS,INC. d/b/a HOUSTON BOXING ASSOCIATION	§	
V.	§	C. A. NO. H-88-2214
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	

CASH BOND FOR REMOVAL

KNOW ALL MEN BY THESE PRESENTS:

That Jeffrey D. Levine, HBA East, Ltd., HBA East, Inc., Ring Network Inc., Ring Sports Promotions, Inc., and Round One Productions, Inc., Petitioners, in the above-referenced cause of action, tenders the amount of $500.00 to the court as a cash bond to Plaintiffs.

The condition of this obligation is such that Petitioner have petitioned the United States District Court for the Southern District of Texas for the removal of a certain cause pending in the 157th Judicial District Court of Harris County, Texas styled:

JEA Boxing Company, Inc., and Pine Hill Investments, Inc. d/b/a Houston Boxing Association v. HBA East, Ltd., a Texas Limited Partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine, and bearing the number 87-10167 on the docket of such Court.

NOW, THEREFORE, the condition of the above obligation is such that if Petitioners shall pay all costs and disbursements incurred by reason of said removal proceeding, should it be determined that said action was not removable or was improper to remove, then this obligation shall be null and void; otherwise, it shall remain in full force and effect.

WITNESS MY HAND on this the 21st day of June, 1988.

/s/Michael A. Caddell
Michael A. Caddell
SDTA No. 7426

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Houston, Texas 77010-3027
(713) 751-0400

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEA BOXING COMPANY, INC.,AND PINE HILL INVESTMENTS,INC. d/b/a HOUSTON BOXING ASSOCIATION	§	
V.	§	C. A. NO. _____
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	

PETITION FOR REMOVAL

TO: The Judges of the United States District Court:

The Petition of Jeffrey D. Levine ("Levine"), HBA East, Inc., Ring Network Inc., Ring Sports Promotions, Inc., and Round One Productions, Inc., hereinafter referred to as "Petitioners," respectfully shows:

1. On March 3, 1987, the following action was commenced in the 157th Judicial District of Harris County, Texas styled: JEA Boxing Company, Inc., and Pine Hill Investments, Inc. d/b/a Houston Boxing Association vs. HBA East, Ltd., et al., and bearing the Number 87-10167. Service was made upon Petitioners of

the Plaintiffs' Original Petition therein, a copy of which is attached hereto as Exhibit "A", and incorporated for all purposes herein by reference.

2. No other proceedings have been filed in the action in Harris County.

3. On March 27, 1987, Petitioners Levine, HBA East, Inc., and Round One Productions, Inc., filed voluntary petitions for reorganization under Chapter 11 of the United States Bankruptcy Code. The filing of these petitions operated as an automatic stay of all actions and proceedings in the referenced suit in Texas State Court with respect to the Petitioners pursuant to Section 362 of the Bankruptcy Code.

4. on June 3, 1988, the Bankruptcy Court dismissed the Chapter 11 bankruptcy cases filed by Petitioners, thus lifting the automatic stay on proceedings in this case. Therefore, pursuant to 11 U.S.C. § 108, the filing of this petition for removal is timely.

5. The above-described action is a civil action of which this Court has original jurisdiction under the provisions of Title 28, U.S.C. § 1332, and is one which may be removed to this Court by Petitioners, Defendants therein, pursuant to the provisions of Title 28, U.S.C. § 1441, in that it is a civil action wherein the amount in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs, and is between citizens of different states.

6. As is shown by paragraph I of Plaintiffs' Original Petition, Petitioner Jeffrey D. Levine, at the time this action was commenced, was and still is an individual who is a citizen of the State of New York.

7. As is shown by paragraph I of Plaintiffs' Original Petition, Petitioner HBA East, Inc., at the time this action commenced, was and still is a corporation organized under the laws of the State of New York, whose principal place of business is located in the State of New York. For jurisdictional purposes, HBA East, Inc., is a citizen of the State of New York.

8. As is shown by paragraph I of Plaintiffs' Original Petition, Petitioner Ring Network, Inc., at the time this action commenced, was and still is a corporation organized under the laws of the State of New York, whose principal place of business is located in the State of New York. For jurisdictional purposes, Ring Network, Inc., is a citizen of the State of New York.

9. As is shown by paragraph I of Plaintiffs' Original Petition, Petitioner Ring Sports Promotions, Inc., at the time this action commenced, was and still is a corporation organized under the laws of the State of New York, whose principal place of business is located in the State of New York. For jurisdictional purposes, Ring Sports Promotions Inc., is a citizen of the State of New York.

10. As is shown by paragraph I of Plaintiffs' Original Petition, Petitioner Round One Productions, Inc., at the time this action commenced, was and still is a corporation organized under the laws of the State of New York, whose principal place of business is located in the State of New York. For jurisdictional purposes, Round One Productions, Inc., is a citizen of the State of New York.

11. As is shown by paragraph I of Plaintiffs' Original Petition, Plaintiff Pine Hill Investments, Inc. d/b/a Houston Boxing Association, at the time this action was commenced, was and still is a corporation organized under

the laws of the State of Texas, whose principal place of business is located in the State of Texas. For jurisdictional purposes, Pine Hill Investments, Inc. d/b/a Houston Boxing Association, is a citizen of the State of Texas.

12. As in shown by paragraph I of Plaintiffs' Original Petition, Plaintiff JEA Boxing Company, Inc., at the time this action was commenced, was and still is a corporation organized under the laws of the State of Texas, whose principal place of business is located in the State of Texas. For jurisdictional purposes, JEA Boxing Company, Inc., is a citizen of the State of Texas.

13. The proper alignment in this matter and citizenship of Named Defendant HBA East, Ltd. (if such entity exists at all), is in dispute. Although paragraph I of Plaintiffs' Original Petition identifies HBA East, Ltd., as a Texas Limited Partnership duly authorized to conduct business within Texas, and alleges that HBA East, Ltd., it maintains its principal place of business in the State of New York, the allegations set forth in Plaintiffs' Original Petition concerning the interests and citizenship of HBA East, Ltd., are false and misleading, and were made wrongfully, fraudulently, and falsely for the sole purpose of defeating diversity jurisdiction in this matter.

14. First, Petitioners dispute the existence of HBA East, Ltd. Moreover, even if the existence of HBA East, Ltd., is assumed, as shown by the Plaintiffs' Complaint (Exhibit "B" hereto) filed in the bankruptcy proceeding in New York dismissed earlier this month, Plaintiffs have seized control of HBA East, Ltd. (paragraphs 22 and 23 of the Complaint, Exhibit "B'), and all of Plaintiffs' alleged claims and causes of action herein are directed solely at Petitioners (paragraph 21 of the Complaint, Exhibit "B"). The claims directed at HBA East, Ltd., in Plaintiffs' Original Petition are a sham, since HBA East, Ltd. --if it

exists at all--is the creation of the Plaintiffs and subject to their sole control.

15. Finally, since by their own admission (paragraphs 22 and 23 of the Complaint, Exhibit "B") Plaintiffs have seized control of HBA East, Ltd. (if it exists and if Plaintiffs did not already have control), the jurisdictional allegations regarding HBA East, Ltd., which are contained in paragraph I of Plaintiffs' Original Petition cannot now be true, if they ever were. The principal place of business of HBA East, Ltd., if any, is Houston, Harris County, Texas.

16. Therefore, when the parties are properly aligned in accordance with their real interests in this controversy, and when the true facts are determined concerning the existence and citizenship of HBA East, Ltd., it will be clear that this Court has jurisdiction over this controversy pursuant to Title 28, U.S.C. § 1332.

17. Petitioners file herewith a cash bond in the sum of $500.00, conditioned, as provided by Title 28, U.S.C. § 1446(d), that Petitioners will pay all costs and disbursements incurred by reasons of the removal proceedings hereby brought, should it be determined that this action is not removable or is improperly removed.

Additionally, as verified by the attorney for Petitioners, a copy of this Petition for Removal and Notice of Filing a Cash Bond will be properly filed with the Harris County District Clerk's office.

Respectfully submitted,

/s/Michael A. Caddell
Michael A. Caddell
SDTA No. 7426

The Park in Houston Center
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Caddell & Conwell
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Houston, Texas 77010-3027
(713) 751-0400

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Removal has been forwarded to all counsel of record by certified mail, return receipt requested, on this the 27th day of June, 1988.

/s/Michael A. Caddell

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HBA BOXING COMPANY, INC., ET AL.,	§	
Plaintiffs,	§	
V.	§	C. A. NO. H-88-2214
HBA EAST, LTD., et al.,	§	
Defendants,	§	

ORDER REMANDING THE CASE TO THE 157TH DISTRICT COURT

On the plaintiffs' motion, this case is remanded to the 157th District Court, Harris County, Texas.

Signed on June 30, 1988, at Houston, Texas.

/s/Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX H

NO. 87-010167

JEA BOXING COMPANY, INC., AND PINE HILL INVESTMENTS, INC. d/b/a HOUSTON BOXING ASSOCIATION	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	157TH JUDICIAL DISTRICT

MOTION FOR NEW TRIAL

HBA East, Ltd., a Texas limited Partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine, Defendants herein, move this Court to set aside the default judgment rendered on Saturday, April 1, 1989, in the above-entitled cause and order a new trial and in support hereof would respectfully show the Court the following:

I.

The default judgment granted against Defendants, HBA East, Ltd., a Texas limited partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc. and Jeffrey D. Levine, was

defective and based on the incorrect assumption that Defendants' answer was past due, in that:

(1) Plaintiffs' attorney, Mr. H. Dixon Montague, in violation of Rule 237(a) of the Texas Rules of Civil Procedure, failed to provide the undersigned, Defendants' attorney-of-record, with written notice of the filing of the Order of Remand.[1] Rule 237(a) specifically provides that:

> When any cause is removed to Federal Court and is afterwards remanded to the state court, the plaintiff shall file a certified copy of the order of remand with the clerk of the state court and shall forthwith give written notice of such filing to the attorneys of record for all adverse parties. All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer.

1. Mr. Montague has also violated Rule 239(a) of the Texas Rules of Civil Procedure. Rule 239(a) states that "[a]t or immediately prior to the time . . . [a] final default judgment is rendered, the party taking the same or his attorney Shall certify . . . in writing the [defendants" last known mailing address . . . ." Mr. Montague filed the certificate five (5) days after entry of the default judgment. Although Defendants' counsel realizes that this violation does not effect the finality of this Court's Order, it serves to illustrate Mr. Montague's disregard for the Rules of Civil Procedure and creates serious doubt about his good faith in this matter (the delay meant that notice was not received by the Defendants until after Mr. Montague had obtained another ex narte order from this Court disbursing our $175,000 in bonds held in the Court's registry.)

The undersigned has never received written notice from Mr. Montague of the filing of the Remand Order. (Notice of the default judgment was only recently received by the Defendants in New York). (See attached affidavit.) Manifestly, Defendants' answer could not have been filed in this lawsuit until written notice was provided to Defendants' counsel.

(2) Pursuant to the express terms of Rule 239 of the Texas Rules of Civil Procedure a plaintiff may take a default judgment against a defendant only "[u]pon such call of the docket, or at any time after a defendant is required to answer . . . ." In view thereof, if the Defendants were required to file an answer and had failed to do so, entry of the judgment would have been proper. However, in light of the specific provisions of Rule 237(a), the filing of Defendants' answer was triggered only when Mr. Caddell received written notice of the filing of the Remand Order. In the absence of Rule 237(a) notice, the due-date of Defendants' answer could not have been established.

WHEREFORE, PREMISES CONSIDERED, Defendants, HBA East, Ltd., a Texas limited partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine, request that this Court set aside the default judgment entered in this cause and order a new trial. Defendants further pray that this Court order the return of the $175,000, plus any interest accumulated thereon, immediately into the registry of this Court; that Defendants be awarded reasonable and necessary

attorneys' fees incurred in bringing this Motion in the amount of $750.00; for costs of Court; and for such other and further relief, both at law and in equity, to which Defendants may show themselves justly entitled.

Respectfully submitted,

/s/ Michael A. Caddell
Michael A. Caddell
SBT No. 03576700

1331 Lamar, Suite 1070
Houston, Texas 77010-3027
(713) 751-0400

ATTORNEY-IN-CHARGE
FOR DEFENDANTS

OF COUNSEL:

Tamera L. Kinnie
Caddell & Conwell
1331 Lamar, Suite 1070
Houston, TX 77010-3027
(713) 751-0400

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been forwarded by hand delivery on this the 28th day of April, 1989, to the following:

H. Dixon Montague
Vinson & Elkins
1001 Fannin Street
3200 First City Tower
Houston, TX 77002-6760

/s/ Michael A. Caddell
Michael A. Caddell

H-6

NO. 87-010167

JEA BOXING COMPANY, INC., AND PINE HILL INVESTMENTS, INC. d/b/a HOUSTON BOXING ASSOCIATION	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	157TH JUDICIAL DISTRICT

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared Michael A. Caddell who, after being duly sworn, did state the following under oath:

> My name is Michael A. Caddell. I am the attorney-of-record for Defendants herein and have personal knowledge of the following:
>
> On June 27, 1988, Defendants' Petition for Removal was filed in the United States District Court for the Southern District of Texas. Notice of the Petition for Removal was forwarded to Plaintiffs' counsel on June 27, 1988. On June 29, 1988, Plaintiffs filed their Response to Defendants' Petition for Removal and Request to Remand this cause to the 157th District Court.

The Order of Remand was signed by Judge Lynn Hughes, on June 30, 1988. Mr. Montague, Plaintiffs' counsel did not, and has not, provided me with written notice of the filing of the certified copy of the Remand Order, in violation of Rule 237(a) of the Texas Rules of Civil Procedure.

Further affiant sayeth not.

/s/ Michael A. Caddell
AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME on this the 28th day of April, 1989.

/s/ Michele Ebow
Notary Public in and for
the State of Texas

15TLK/L04802.P2

APPENDIX I

NO. 87-010167

JEA BOXING COMPANY, INC., AND PINE HILL INVESTMENTS, INC. d/b/a HOUSTON BOXING ASSOCIATION	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	157TH JUDICIAL DISTRICT

ORDER DENYING MOTION FOR NEW TRIAL

BE IT REMEMBERED that on this day came on to be heard the Defendants' Motion for New Trial. After considering the pleadings on file herein, the evidence at trial, the arguments of counsel, and all other matters relevant to the consideration of the Defendants' Motion, it is the opinion of this Court that the Defendants' are not entitled to a new trial in this action. It is, therefore,

ORDERED that the Plaintiffs' Motion for New Trial is in all things denied.

SIGNED this the 10th day of May, 1989.

/s/ Felix Salazar, Jr.
JUDGE PRESIDING

APPROVED:

VINSON & ELKINS

/s/ H. Dixon Montague
H. Dixon Montague
State Bar No. 14277700
1001 Fannin Street
3200 First City Tower
Houston, Texas 77002-6160
(713) 651-2086

ATTORNEYS FOR PLAINTIFFS, JEA BOXING COMPANY, INC. AND PINE HILL INVESTMENTS, INC, d/b/a HOUSTON BOXING ASSOCIATION

APPROVED AS TO FORM ONLY:

CADDELL & CONWELL

/s/ Michael A. Caddell
Michael A. Caddell
State Bar No. 03576700
1331 Lamar, Suite 1070
Houston, Texas 77010-3027

ATTORNEYS FOR DEFENDANTS, HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE

APPENDIX J

NO. 01-89-557-CV

IN THE
COURT OF APPEALS
FOR THE
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS
SITTING AT
HOUSTON, TEXAS

HBA EAST, LTD., ET AL.,

Appellants,

VS.

JEA BOXING COMPANY, INC., ET AL.,

Appellees.

ON APPEAL FROM THE 157TH JUDICIAL
DISTRICT COURT OF HARRIS COUNTY, TEXAS

BRIEF FOR APPELLANTS

BUTLER & BINION
Joe C. Holzer
Marilyn J. Wright
1600 First Interstate
Bank Plaza
Houston, Texas 77002
(713) 237-3642

ATTORNEYS FOR
APPELLANTS

Oral argument is requested

INTERESTED PARTIES

Pursuant to Rule 74(a), Texas Rules of Appellate Procedure, the names of all parties are listed below in order that the members of the Court may determine whether they are disqualified to serve or should recuse themselves from participation in the decision of this case.

Appellants (Defendants below) are:

HBA East, Ltd.
HBA East, Inc.
Ring Network, Inc.
Ring Sports Promotions, Inc.
Round One productions, Inc.
Jeffrey D. Levine

Appellants' counsel are:

On appeal only:

Joe C. Holzer
Marilyn J. Wright
Butler & Binion, Houston, Texas

In the trial court:

Michael A. Caddell
Caddell & Conwell, Houston, Texas

Appellees (Plaintiffs below) are:

JEA Boxing Company, Inc.
Pinehill Investments, Inc. d/b/a
Houston Boxing Association

Appellees' counsel are:

H.Dixon Montague
Vinson & Elkins, Houston, Texas

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NO. 01-89-557-CV

IN THE
COURT OF APPEALS
FOR THE
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS
SITTING AT
HOUSTON, TEXAS

HBA EAST, LTD., ET AL.,

Appellants,

VS.

JEA BOXING COMPANY, INC., ET AL.,

Appellees.

BRIEF FOR APPELLANTS

TO THE HONORABLE FIRST COURT OF APPEALS:

Appellants, HBA EAST, LTD., HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., and JEFFREY D. LEVINE ("Levine") respectfully submit this brief in support of their appeal of the default judgment entered by the trial court. This appeal is from the 157th Judicial District Court of Harris County, Texas, Cause No. 87-10167, in which Appellants were defendants and Appellees JEA BOXING COMPANY, INC., and PINEHILL INVESTMENTS, INC., d/b/a HOUSTON BOXING ASSOCIATION were plaintiffs.

For the sake of brevity and consistency, Appellants will be referred to collectively as "Appellants" and Appellees will be referred to collectively as "Appellees."

STATEMENT OF THE CASE

This is an appeal from an $8,861,380.00 default judgment, taken in violation of Texas Rule of Civil Procedure 237a, in a case which arose out of an alleged partnership between Appellants and Appellees. The trial court entered judgment on Saturday, April 1, 1989. (Tr. 129-36). On April 10, 1989, the trial court ordered the District Clerk to release funds from the registry of the court to Appellees immediately upon receipt of the funds from the United States District Court for the Southern District of Texas. (Tr. 140-41). On April 10, 1989, Appellants filed their motion for new trial, which the trial court overruled on May 10, 1989 (Tr. 142-51; 268-69). Appellants Perfected this appeal by filing their cost bond on June 2, 1989. (Tr. 447).

APPELLANTS' POINTS OF ERROR

FIRST POINT OF ERROR

THE TRIAL COURT ERRED IN ENTERING A DEFAULT JUDGMENT FOR APPELLEES BEFORE APPELLANTS' ANSWER WAS DUE UNDER TEXAS RULE OF CIVIL PROCEDURE 237a. (TR. 129-36)

SECOND POINT OF ERROR

THE TRIAL COURT ERRED IN ORDERING THE DISTRICT CLERK TO RELEASE 1FUNDS FROM THE COURT'S REGISTRY TO APPELLEES ON THE BASIS OF A VOID JUDGMENT. (TR. 140-41)

STATEMENT OF FACTS (GERMANE TO ALL POINTS OF ERROR)

Appellees filed their Original Petition on March 3, 1987, seeking the dissolution of an alleged partnership with Appellants, all right and interest in the alleged partnership's assets, and actual and punitive damages. (Tr. 2-87). HBA East,Inc. was served through its registered agent for service of process on March 5, 1987. (Tr. 89). HBA Ltd. was served through its managing partner, HBA, Inc., by service on its registered agent on March 6, 1987. (Tr. 90). The remaining defendants were served through the Secretary of State on March 6, 1987. (Tr. 91-94).

On March 27, 1987, before their answers were due in the Harris County District Court, HBA East, Inc., Round One Productions, Inc. and Levine filed petitions for Chapter 11 bankruptcy reorganization in the Eastern District of New York. (No. 187-70557-353) During the course of the bankruptcy proceedings, $175,000.00 was escrowed by order of the bankruptcy court. On June 3, 1988, the bankruptcy judge dismissed Appellants' petition.

On June 27, 1988, Appellants removed the Texas action to federal court. (Tr. 275-85). The Honorable Lynn N. Hughes, of the United states District Court for the Southern District of Texas, ordered the case remanded and ordered Appellants to deposit the $175,000.00 in escrow in New York in the registry of his Court. (Tr. 120, 160). The funds were subsequently deposited in the federal court's registry.

Judge Hughes signed an order of remand on June 30, 1988. (Tr. 128). On March 29, 1989, a certified copy of Judge Hughes' remand order was filed with the clerk of the Harris County district court. (Tr. 128). Appellants never received written notice that the remand order had been filed in Harris County. (Tr. 143).

At a hearing held on Saturday, April 1, 1989, the trial court entered a default judgment against Appellants, jointly and severally, for $2,215,595.00 in actual damages, $6,645,785.00 in punitive damages, and post-judgment interest. In addition, the judgment awarded Appellees the $175,000.00 plus interest then on deposit in the registry of the United States District Court for the Southern District of Texas, provided that the partnership upon which the underlying lawsuit was based was thereby dissolved, and awarded Appellees all right and interest in the partnership assets. (Tr. 129-39).

Appellees filed a certificate of Appellants' last known mailing address on April 5, 1989. (Tr. 137). On April 10, 1989, the trial court entered an ex parte order directing the district clerk to immediately pay all funds transferred from the registry of the Southern District to the Appellees. (Tr. 140-41).

On April 28, 1989, Appellants filed their motion for new trial, asserting that the judgment was void because their answer was not yet due according to Texas Rule of Civil Procedure 237a when judgment was rendered. (Tr. 142-51). Although Appellants had filed their original answer (Tr. 122-24), the trial court denied Appellants' motion for new trial on May 10, 1989. (Tr. 268).

ARGUMENT AND AUTHORITIES
FIRST POINT OF ERROR (RESTATED)

THE TRIAL COURT ERRED IN ENTERING A DEFAULT JUDGMENT FOR APPELLEES BEFORE APPELLANTS' ANSWER WAS DUE UNDER TEXAS RULE OF CIVIL PROCEDURE 237a. (TR. 129-36)

Pursuant to Texas Rule of Civil procedure 237a,

> When any cause is removed to the Federal Court and is afterwards remanded to the state court, the plaintiff shall file a certified copy of the order of remand with the clerk of the state court and shall forthwith give written notices of such filing to the attorneys of record for all adverse parties. All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer.

Tex. R. Civ. P 237a (Vernon Supp. 1989) Because Appellees failed to comply with Rule 237a, the default judgment in this case was premature and therefore, void.

Courts have historically looked upon default judgments with disfavor. Humphrey Co. v. Lowry Water Wells, 709 S.W.2d 310, 311 (Tex. App.--Houston [14th Dist.) 1986, no writ). Strict compliance with the rules of civil procedure is required to support a default judgment. Becker v. Russell, 765 S.W.2d 899, 900 (Tex App.--Austin 1989, no writ). In a direct attack on a default judgment, "every step of the proceeding, from process to final judgment, is open to examination" and no presumptions are entertained. Texas Inspection Serv. v. Melville, 616 S.W.2d 253, 254 (Tex App.--Houston [1st Dist.) 1981, no writ).

A party may take a default judgment against a defendant only "after a defendant is required to answer." Tex. R. Civ. P. 239 (Vernon 1976).

> The two basic judicial decisions a trial judge must make before rendering and entering a default

> judgment are (l) that the court has jurisdiction of the subject matter and the parties to the suit, and (2) that, on the record, the case is ripe for the judgment.

Finlay v. Jones, 435 S.W.2d 136, 138 (Tex 1969) (emphasis added). A judgment entered before the defendant's answer is due is void. Surety Ins. Co. v. State, 514 S.W.2d 454, 457 (Tex. Crim. App. 1974) (review of bond forfeiture proceeding governed by Rules of Civil procedure); Sublett v. Black, 617 S.W.2d 754, 756 (Tex Civ. App.--Houston [14th Dist.] 1981, writ dism'd); Ramirez v. Ramirez, 554 s.W.2d 253, 254 (Tex Civ. App.--El Paso 1977, writ dism'd w.o.j.). Appellees' default judgment was entered before Appellants' answer was due and is consequently void.

Appellees filed their Original Petition in the trial court on March 3, 1987, and served Appellants on March 6 and 7, 1987. Appellants' answers were originally due "on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service," or March 30, 1987. Tex. R. Civ. P. 99(b) (Vernon Supp. 1989).

On March 27, 1987, Appellants Levine, HBA East, Inc., and Round One Productions, Inc. filed bankruptcy petitions. The bankruptcy filings acted as an automatic stay and halted the pending state court action until the stay was lifted or the bankruptcy was dismissed. 11 U.S.C.A. § 362(a) (West 1979); Howard v. Howard, 670 S.W.2d 737, 739 (Tex. App.--San Antonio 1984, no writ).

On June 3, 1988, the bankruptcy was dismissed, lifting the automatic stay and allowing the state court

action to proceed.[1] On June 27, 1988, Appellants removed the Texas action to the United States District Court for the southern District of Texas. (Tr. 275-85). Although the Honorable Lynn N. Hughes signed an Order of Remand on June 30, 1988, no certified copy of that Order was filed with the Harris County district court until March 28, 1989.[2] (Tr. 128). Appellants never received written notice of this filing. (Tr. 143). Without notice to Appellants, Appellees secured a default judgment four days later.[3]

---

1. Section 108 of the Bankruptcy Code provides, in pertinent part:
(c) . . . if applicable non bankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of --

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C.A. § 108(c) (West Supp. 1989). Because the automatic stay of the instant suit was terminated pursuant to section 362(c)(2)(B), the answer was due thirty days thereafter, July 5, 1988. Howard, 670 s.W.2d at 739; see Tex. R. Civ. p. 4 (Vernon 1979).

2. The clerk of the federal district court is required to furnish the state court with a certified copy of the order of remand. 28 U.S.C.A. § 1447(c) (West Supp. 1989). The trial court's docket sheet indicates receipt of the remand order on March 28, 1989, but does not reflect its source. (Tr. 445).

3. Although Rule 239a requires the party taking a default judgment to file a certificate of the defendants' last known mailing address "[a)t or immediately prior to the time" the default is entered, Appellees filed the certificate five days after entry of the judgment. (Tr. 137-39). As a result, Appellees obtained an ex parte order disbursing more than $184,000.00 from the court's registry before Appellants received notice of the judgment. (Tr. 140).

Knutson v. Ripson, 346 S.W.2d 424 (Tex. Civ. App.--Amarillo 1961, no writ) addressed the consequences of failure to provide the required written notice that a certified copy of the remand order has been filed. After quoting Rule 237a, the court stated:

> A careful search of the record reveals no such written notice was given [defendants'] attorneys. [Plaintiff) failed to comply with the plain language of the rule quoted above and therefore he is not in a position to complain of the failure of [defendants) to file their answer before the default judgment was requested.

Id. at 425.

Rule 237a is designed to protect defendants who have not filed an answer from default. Weimer v. Scott, 666 S.W.2d 384, 385 (Tex App.--Houston [14th Dist.] 1984, writ denied). Compliance would have cost Appellees the price of postage to notify Appellants that the remand order had been filed; non-compliance cost Appellants a default judgment in excess of $8.8 million. See Whitney v. L & L Realty Corp., 500 S.W.2d 94,96 (Tex 1973); Humphrey Co. v. Lowry Water Wells, 709 S.W.2d 310, 311-12 (Tex. App.--Houston [14th Dist.) 1986, no writ).

The earliest date Appellants' answer could have been due under the rules is April 12, 1989. Appellees secured their default judgment on Saturday, April 1, 1989, eleven days before Appellants' answer could possibly have been due. The trial court clearly failed to apply the second prong of the Texas Supreme Court's test: on the record, the case was not "ripe for the judgment." Finlay v.

Jones, 435 S.W.2d at 138. The judgment is void and must be set aside.

SECOND POINT OF ERROR (RESTATED)

THE TRIAL COURT ERRED IN ORDERING THE DISTRICT CLERK TO RELEASE FUNDS FROM THE COURT'S REGISTRY TO APPELLEES BASED ON A VOID DEFAULT JUDGMENT. (TR. 140-41)

On April 10, 1989, the trial court ordered the district clerk to

> immediately pay out all monies transferred to him from the Registry of the United States District Court for the southern District of Texas in the case styled JEA Boxing Co., Inc. and pinehill Investments, Inc. d/b/a Houston Boxing Association v. HBA East, Ltd., HBA East, Inc., Ring Network, Inc., Ring sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine, C.A. No. H-88-2214, plus any interest accumulated thereon, to the plaintiffs.

(Tr. 140-41). As set forth in detail in the argument under Appellants' First Point of Error, the default judgment entered by the trial court on April 1, 1989, was void. A void judgment is a nullity and will not support orders in aid of its enforcement. Commander v. Bryan, 123 S.W.2d 1008, 1015 (Tex. Civ. App.--Fort Worth 1938, no writ); See also Boyd v. Gillman Film Corp., 447 S.W.2d 759 (Tex. Civ. App.--Dallas 1969, writ ref'd n.r.e.) (execution on void judgment). The trial court, therefore, erred in

ordering the immediate release to Appellees of funds from the court's registry. Those funds must be returned to the registry of the district court pending trial of this case on the merits.

CONCLUSION

The trial court rendered a multi-million dollar default judgment, including over $6,000,000.00 in punitive damages, eleven days before Appellants' answer could have been due under Rule 237a. The judgment was therefore void and of absolutely no force and effect. As a result of the entry of this void default judgment, over $184,000.00 has been released from the registry of the Harris county district court and the Appellees have taken further steps to execute against the Appellants, both in Texas and in New York. (Tr. 270-72). This judgment must be set aside and the parties returned to the status quo so that trial may proceed on the merits.

WHEREFORE, PREMISES CONSIDERED, Appellants respectfully request that this Court (1) vacate the judgment and remand this case to the trial court for further proceedings, (2) order Appellees to return the $184,482.07, plus interest, to the registry of the Harris

County district court, (3) award Appellants their costs and (4) grant such other and further relief as they may be justly entitled.

Respectfully submitted,

BUTLER & BINION

By: /s/Joe C. Holzer
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Marilyn J. Wright
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(713) 237-3642

ATTORNEYS FOR APPELLANTS, HBA EAST, LTD., a Texas Limited Partnership, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., and JEFFREY D. LEVINE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief for Appellants has been forwarded by messenger to counsel for Appellees, Mr. H. Dixon Montague, 1001 Fannin, 3200 First City Tower, Houston, Texas 77002-6760 on this the 25th day of August, 1989.

/s/Marilyn J. Wright
Marilyn J. Wright

APPENDIX K

RECEIVED
FIRST COURT OF APPEALS
HOUSTON, TEXAS

OCTOBER 2, 1989

KATHRYN COX
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K-2

NO. 01-89-557-CV

IN THE
COURT OF APPEALS
FOR THE
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS
SITTING AT
HOUSTON, TEXAS

HBA EAST, LTD., ET AL.,

Appellants,

VS.

JEA BOXING COMPANY, INC., ET AL.,

Appellees.

ON APPEAL FROM THE 157TH JUDICIAL
DISTRICT COURT OF HARRIS COUNTY, TEXAS

AMENDED BRIEF FOR APPELLANTS

BUTLER & BINION
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1600 First Interstate
Bank Plaza
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(713) 237-3642

ATTORNEYS FOR
APPELLANTS

Oral argument is requested

INTERESTED PARTIES

Pursuant to Rule 74(a), Texas Rules of Appellate Procedure, the names of all parties are listed below in order that the members of the Court may determine whether they are disqualified to serve or should recuse themselves from participation in the decision of this case.

Appellants (Defendants below) are:

HBA East, Ltd.
HBA East, Inc.
Ring Network, Inc.
Ring Sports Promotions, Inc.
Round One productions, Inc.
Jeffrey D. Levine

Appellants' counsel are:

On appeal only:

Joe C. Holzer
Marilyn J. Wright
Butler & Binion, Houston, Texas

In the trial court:

Michael A. Caddell
Caddell & Conwell, Houston, Texas

Appellees (Plaintiffs below) are:

JEA Boxing Company, Inc.
Pinehill Investments, Inc. d/b/a
Houston Boxing Association

Appellees' counsel are:

H.Dixon Montague
Vinson & Elkins, Houston, Texas

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APPELLANTS' POINTS OF ERROR
FIRST POINT OF ERROR

THE TRIAL ERRED IN ENTERING A DEFAULT JUDGMENT FOR APPELLEES AFTER APPELLANTS HAD APPEARED IN THE CASE, WITHOUT NOTICE TO APPELLANTS OF THE HEARING ON APPELLEES' MOTION FOR DEFAULT JUDGMENT, IN VIOLATION OF APPELLANTS' RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. (TR. 129-36)

SECOND POINT OF ERROR

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THIRD POINT OF ERROR

THE TRIAL COURT ERRED IN ORDERING THE DISTRICT CLERK TO RELEASE FUNDS FROM THE COURT'S REGISTRY TO APPELLEES ON THE BASIS OF A VOID JUDGMENT. (TR. 140-41)

STATEMENT OF FACTS (GERMANE TO ALL POINTS OF ERROR)

Appellees filed their Original Petition on March 3, 1987, seeking the dissolution of an alleged partnership with Appellants, all right and interest in the alleged partnership's assets, and actual and punitive damages. (Tr. 2-87). HBA East,Inc. was served through its registered agent for service of process on March 5, 1987. (Tr. 89). HBA Ltd. was served through its managing partner, HBA, Inc., by service on its registered agent on March 6, 1987. (Tr. 90). The remaining defendants were served through the Secretary of State on March 6, 1987. (Tr. 91-94).

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Once a defendant has made an appearance in a cause, he is entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment to the Federal Constitution. Peralta v. Heights Med. Center, Inc., ___ U.S. ___ 108 S. Ct. 896 (1988). The Judgment recites: "Defendants, although having made an appearance in this action, failed to answer." (Tr. 129). Appellants had no actual or constructive notice of the hearing on Appellees' Motion for Default Judgment. Entry of the resulting default judgment was reversible error.

On September 20, 1989, the Texas Supreme Court decided LBL Oil Co v. International Power Services, Inc., 32 Tex. Sup. Ct. J. 619 (Sept. 20, 1989). The LBL Oil Co. decision justifies the submission of this amended brief and provides definitive authority for the point of error now submitted to the Court.

In the LBL Oil Co. case the Texas Supreme Court held that default judgment proceedings are equivalent to a trial setting which cannot be conducted without actual or constructive notice of the hearing to all relevant parties who have appeared in a case. Id. at 619. Because the record in LBL Oil Co. established that the defendant had no actual or constructive notice of the hearing, the court

held that entry of the default judgment was reversible error, set aside the judgment, and remanded the cause to the trial court. Id. at 619-20. The operative facts in LBL Oil Co. are identical to the circumstances surrounding Appellants' "default" in this action. Appellants had no actual or constructive notice of the hearing conducted on Saturday, April 1, 1989, and entry of the resulting default judgment was reversible error.

The decision of the Texas Supreme Court in LBL Oil Co. is controlling. The trial court entered a multi-million dollar default judgment in violation of Appellants' Fourteenth Amendment due process rights. The judgment must therefore be set aside and this case remended to the trial court.

SECOND POINT OF ERROR (RESTATED)

THE TRIAL COURT ERRED IN ENTERING A DEFAULT JUDGMENT FOR APPELLEES BEFORE APPELLANTS' ANSWER WAS DUE UNDER TEXAS RULE OF CIVIL PROCEDURE 237a. (TR. 129-36)

Pursuant to Texas Rule of Civil Procedure 237a,

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Tex. R. Civ. P. 237a (Vernon Supp. 1989). Because Appellees failed to comply with Rule 237a, the default judgment in this case was premature and therefore, void.

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On March 27, 1987, Appellants Levine, HBA East, Inc., and Round One Productions, Inc. filed bankruptcy petitions. The bankruptcy filings acted as an automatic stay and halted the pending state court action until the stay was lifted or the bankruptcy was dismissed. 11 U.S.C.A. § 362(a) (West 1979); Howard v. Howard, 670 S.W.2d 737, 739 (Tex. App.--San Antonio 1984, no writ).

On June 3, 1988, the bankruptcy was dismissed, lifting the automatic stay and allowing the state court

action to proceed.[1] On June 27, 1988, Appellants removed the Texas action to the United States District Court for the Southern District of Texas. (Tr. 275-85). Although the Honorable Lynn N. Hughes signed an Order of Remand on June 30, 1988, no certified copy of that Order was filed with the Harris County district court until March 28, 1989.[2] (Tr. 128). Appellants never received written notice of this filing. (Tr. 143). Without notice to Appellants, Appellees secured a default judgment four days later.[3]

1. Section 108 of the Bankruptcy Code provides, in pertinent part:
(c) . . . if applicable non bankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of --

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C.A. § 108(c) (West Supp. 1989). Because the automatic stay of the instant suit was terminated pursuant to section 362(c)(2)(B), the answer was due thirty days thereafter, July 5, 1988. Howard, 670 s.W.2d at 739; see Tex. R. Civ. p. 4 (Vernon 1979).

2. The clerk of the federal district court is required to furnish the state court with a certified copy of the order of remand. 28 U.S.C.A. § 1447(c) (West Supp. 1989). The trial court's docket sheet indicates receipt of the remand order on March 28, 1989, but does not reflect its source. (Tr. 445).

3 Although Rule 239a requires the party taking a default judgment to file a certificate of the defendants' last known mailing address "[a]t or immediately prior to the time" the default is entered, Appellees filed the certificate five days after entry of the judgment. (Tr. 137-39). As a result, Appellees obtained an ex parte order disbursing more than $184,000.00 from the court's registry before Appellants received notice of the judgment. (Tr. 140).

Knutson v. Ripson, 346 S.W.2d 424 (Tex. Civ. App.--Amarillo 1961, no writ) addressed the consequences of failure to provide the required written notice that a certified copy of the remand order has been filed. After quoting Rule 237a, the court stated:

> A careful search of the record reveals no such written notice was given [defendants'] attorneys. [Plaintiff) failed to comply with the plain language of the rule quoted above and therefore he is not in a position to complain of the failure of [defendants] to file their answer before the default judgment was requested.

Id. at 425.

Rule 237a is designed to protect defendants who have not filed an answer from default. Weimer v. Scott, 666 S.W.2d 384, 385 (Tex. App.--Houston [14th Dist.) 1984, writ denied). Compliance would have cost Appellees the price of postage to notify Appellants that the remand order had been filed; non-compliance cost Appellants a default judgment in excess of $8.8 million. See Whitney v. L & L Realty Corp., 500 S.W.2d 94, 96 (Tex. 1973); Humphrey Co. v. Lowry Water Wells, 709 S.W.2d 310, 311-12 (Tex. App.--Houston [14th Dist.] 1986, no writ).

The earliest date Appellants' answer could have been due under the rules is April 12, 1989. Appellees secured their default judgment on Saturday, April 1, 1989, eleven days before Appellants' answer could possibly have been due. The trial court clearly failed to apply the second prong of the Texas Supreme Court's test: on the

record, the case was not "ripe for the judgment." Finlay v. Jones, 435 S.W.2d at 138. The judgment is void and must be set aside.

THIRD POINT OF ERROR (RESTATED)

THE TRIAL COURT ERRED IN ORDERING THE DISTRICT CLERK TO RELEASE FUNDS FROM THE COURT'S REGISTRY TO APPELLEES BASED ON A VOID DEFAULT JUDGMENT. (TR. 140-41)

On April 10, 1989, the trial court ordered the district clerk to

> immediately pay out all monies transferred to him from the Registry of the United States District Court for the Southern District of Texas in the case styled JEA Boxing Co., Inc. and Pinehill Investments, Inc. d/b/a Houston Boxing Association v. HBA East, Ltd., HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine, C.A. No. H-88-2214, plus any interest accumulated thereon, to the plaintiffs.

(Tr. 140-41). As set forth in detail in the argument under Appellants' First Point of Error, the default judgment entered by the trial court on April 1, 1989, was void. A void judgment is a nullity and will not support orders in aid of its enforcement. Commander v. Bryan, 123 S.W.2d 1008, 1015 (Tex. Civ. App.--Fort Worth 1938, no writ); See also Boyd v. Gillman Film Corp., 447 S.W.2d 759 (Tex. Civ. App.--Dallas 1969, writ ref'd n.r.e.) (execution on

void judgment) The trial court, therefore, erred in ordering the immediate release to Appellees of funds from the court's registry. Those funds must be returned to the registry of the district court pending trial of this case on the merits.

CONCLUSION

The trial court rendered a multi-million dollar default judgment, including over $6,000,000.00 in punitive damages, eleven days before Appellants' answer could have been due under Rule 237a. The judgment was therefore void and of absolutely no force and effect. As a result of the entry of this void default judgment, over $184,000.00 has been released from the registry of the Harris County district court and the Appellees have taken further steps to execute against the Appellants, both in Texas and in New York. (Tr. 270-72). This judgment must be set aside and the parties returned to the status quo so that trial may proceed on the merits.

WHEREFORE, PREMISES CONSIDERED, Appellants respectfully request that this Court (1) vacate the judgment and remand this case to the trial court for further proceedings, (2) order Appellees to return the $184,482.07, plus interest, to the registry of the Harris

County district court, (3) award Appellants their costs and (4) grant such other and further relief as they may be justly entitled.

Respectfully submitted,

BUTLER & BINION

By: /s/Joe C. Holzer
Joe C. Holzer
State Bar No. 09933800
Marilyn J. Wright
State Bar No. 22048680
1600 First Interstate Bank Plaza
Houston, Texas 7 7002
(713) 237-3642

ATTORNEYS FOR APPELLANTS, HBA EAST, LTD., a Texas Limited Partnership, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., and JEFFREY D. LEVINE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Brief for Appellants has been forwarded by messenger to counsel for Appellees, Mr. H. Dixon Montague, 1001 Fannin, 3200 First City Tower, Houston, Texas 77002-6760 on this the ___ day of _____, 1989.

/s/ Marilyn J. Wright
Marilyn J. Wright

APPENDIX L

DATE: /s/5/12/89

REQUEST FOR WRIT OF EXECUTION,
WRIT OF EXECUTION & ORDER OF SALE
OR WRIT OF POSSESSION

Please process this request to have:

__X__ WRIT OF EXECUTION ISSUED
____ WRIT OF EXECUTION & ORDER OF SALE ISSUED
____ WRIT OF POSSESSION ISSUED

Returnable in: ___ 30 days ___ 60 days ___ 90 days

Party requesting: Plaintiff

Cause No.: 87-10167 Court: 157th Judicial District Court

Style JEA Boxing Company, Inc., and Pine Hill Investments, Inc. d/b/a Houston Boxing Association

vs. HBA East Ltd., a Texas Limited Partnership, HBA East, Inc., Ring Network, Inc., Ring Sports , Promotions Inc., Round One Productions, Inc.,and Jeffrey D. Levine

Date of Judgment: April 1, 1959

Amount of Judgment: $2,215,595.00 actual damages; $6,645,785.00 punitive damages

County or Counties to be executed: Nassau County, New York

Judgment Credits, if any: $175,000.00

Please mail this execution to: Vinson & Elkins
Law Firm
H. Dixon Montague
Attorney
1001 Fannin, 3300 First City Tower
Houston, TX 77002-6760
Address

This request is made in accordance with the time frames set out in Rule 627 T.R.O.C.

Requested by: H. Dixon Montague

RECORDER'S MEMORANDUM

This page is not satisfactory for photographic recordation due to carbon or photo copy, discolored paper, etc. All block-outs, additions and changes were present at time instrument was filed and recorded.

PJ-16 RO8-02-88

APPENDIX M

NO. 87-010167

JEA BOXING COMPANY, INC., AND PINE HILL INVESTMENTS, INC. d/b/a HOUSTON BOXING ASSOCIATION	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	157TH JUDICIAL DISTRICT

AFFIDAVIT FOR IMMEDIATE EXECUTION

BEFORE ME, the undersigned Notary Public, on this day personally appeared H. Dixon Montague, attorney for JEA Boxing Company, Inc. and Pine Hill Investments, Inc., who being by me duly sworn on his oath stated that he is the Plaintiff's attorney in charge in the cause styled JEA Boxing Company. Inc. and Pine Hill Investments. d/b/a Houston Boxing Association v. HBA East. Ltd.. A Texas Limited Partnership. HBA East. Inc.. Ring Network. Inc.. Ring Sports Promotions. Inc.. Round One Productions. Inc.. and Jeffrey D. Levine, No. 87-010167, in the 157th Judicial District Court, Harris County, Texas; that judgment was rendered in favor of the Plaintiffs on the 1st day of April, 1989, in the amount of $2,215,595.00 actual damages and $6,645,785.00 punitive

damages with interest on the total amount of judgment at the rate of ten percent (10%) per annum from the date of judgment until paid, against the Defendants, Jeffrey D. Levine, HBA East, Inc., Round One Productions, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., and HBA East, Ltd., jointly and severally; and that Jeffrey D. Levine for the purpose of further defrauding the Plaintiffs has transferred and it is believed will continue to transfer his personal property and assets and those of the other Defendants, over which he exercises sole control, out of his own name and the name of the other Defendants to make himself and the other Defendants "judgment proof". These assets and property referred to above are subject to execution.

/s/ H. Dixon Montague
H. Dixon Montague

SUBSCRIBED AND SWORN TO BEFORE ME on this the 12th day of May, 1989, to certify which witness my hand and official seal.

/s/ Marianne Garcia
Notary Public, in and for
Harris County, Texas

APPENDIX N

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 PARK AVENUE
NEW YORK, N.Y. 10022

(212) 836-8000

Writer's Direct Dial Number
(212) 836-8564

June 14, 1988

Office of the Court Clerk
District Court, Harris County, Texas
157th Judicial District
Post Office Box 4651
Houston, Texas 77210

Re: JEA Boxing Company, Inc., and Pine Hill Investments, Inc. d/b/a Houston Boxing Association v. HBA East, Ltd., A Texas Limited Partnership, HBA East, Inc., et al; Index No. 87-10167 (the "Texas Action")

To The Clerk of the Court:

We represent HBA East, Inc., Round One Productions, Inc. and Jeffrey W. Levine (collectively, the "Debtors"), which are parties named as defendants in the Texas Action.

On or about March 3, 1987, the plaintiffs commenced the Texas Action against the Debtors, among others. Thereafter, on March 27, 1987 and prior to the time within which the Debtors were required to serve their answer or to file a motion for the removal of the Texas Action to the federal district court, the Debtors filed

voluntary petitions for reorganization under Chapter 11 of the United States Bankruptcy Code. The filing of the foregoing petitions operated as an automatic stay of all actions and proceedings with respect to the Debtors, including the Texas Action, pursuant to Section 362 of the Bankruptcy Code.

Thereafter, on April 24, 1987, the plaintiffs in the Texas Action commenced Adversary Proceeding No. 187-0086 in the United States Bankruptcy Court for the Eastern District of New York (the "Bankruptcy Court") in which the Debtors' Chapter 11 cases were pending (the "New York Proceeding"). A copy of the plaintiffs' complaint in the New York Proceeding, together with exhibits, has been enclosed for your review. As may be readily seen, the plaintiffs' complaint in the New York proceeding, alleges state law claims identical to those which have been raised in the Texas Action. Essentially, by commencing the New York Proceeding, the plaintiffs shifted the venue for the adjudication of such claims from Texas to the New York federal courts.

On May 20, 1987, the Debtors timely filed and served their answer (the "Answer") in the New York Proceeding and, in addition, alleged seven counterclaims against the plaintiffs. The plaintiffs, in turn, filed a reply to the Debtors' counterclaims. During the pending of the Debtors' Chapter 11 cases, discovery conferences were conducted by the Bankruptcy Court, and the respective parties have responded to demands for document production and have conducted depositions in connection with the New York Proceeding. A copy of the Answer as well as the plaintiff's reply are also enclosed herewith.

By an order, dated June 3, 1988 (the "Order"), the Bankruptcy Court dismissed the Debtors' Chapter 11

reorganization cases. However, the Order failed to address the current status of the New York Proceeding in view of the dismissal. Accordingly, the Debtors' intend promptly to move for a clarification of the Order in this respect.

It is the Debtors' position that, in view of the pleadings filed and the progress made in discovery during the pendency of the Debtors' Chapter 11 cases, the New York Proceeding should be transferred from the Bankruptcy Court to the New York federal district court. Alternatively, the Debtors will seek an extension of the time within which to file a petition for removal of the Texas Action to the appropriate federal district court.

We write in order to apprise the Court of the Debtors' current situation. In the event that the Bankruptcy Court determines not to transfer the New York Proceeding to the federal district court in New York, then the instant letter should be deemed a request for the removal of the Texas Action to the federal district court and that all pleadings filed in the New York Proceeding, including the Answer, be deemed the duly filed pleadings of the parties in the Texas Action.

Significant judicial economics can be achieved by continuing the New York Proceeding in the Federal District Court of New York. We hope that the plaintiffs and the Court will recognize that fact so that there may be a prompt adjudication of the underlying claims asserted by the parties hereto. Should a different approach be deemed more advisable by the Court in order to achieve any of the foregoing actions, please apprise us of that fact.

We thank you in advance for your attention and consideration in connection with this matter.

Respectfully yours,

/s/ Arthur Steinberg (JPSD)
Arthur Steinberg

Enclosures

cc: Brian M. Cogan, Esq.
H. Dixon Montague, Esq.

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEA BOXING COMPANY,	*	C.A. No. H-88-2214
INC., AND PINE HILL	*	
INVESTMENTS, INC. d/b/a	*	Houston, Texas
HOUSTON BOXING	*	July 8, 1988
ASSOCIATION	*	8:30 a.m.
	*	
VERSUS		*
	*	
HBA EAST, LTD., A TEXAS	*	
LIMITED PARTNERSHIP,	*	
et al	*	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Mr. H. Dixon Montague
Vinson & Elkins
3200 First City Tower
Houston, Texas 77002

For Kaye-Scholer: Mr. Rey Stroube
Akin, Gump, Strauss, Haver & Feld
700 Louisiana
Houston, Texas 77002

For Jeffrey Levine: Mr. Michael A. Caddell
Ms. Leslie McDonnell
Caddell & Conwell
1331 Lamar, Suite 1070
Houston, Texas 77010

Court Reporter: Fred Warner
515 Rusk Avenue
Houston, Texas 77002

Proceedings recorded by mechanical stenography, produced by computer-aided transcription.

[2]

THE COURT: I have a couple of elementary questions, Mr. Caddell.

I talked to one of Steinberg's partners yesterday whose name I neglected to get. He told me that the firm had ceased representing the parties' defendant in this case.

Do you know anything about that.

MR. CADDELL: Judge, I was advised of that on Tuesday and was told their firm felt that because of the interpleader and because they were taking actions to protect their fees that they deemed might be adverse to the best interest of their client, they felt it would be necessary to withdraw from their representation.

I understand that the Kaye-Scholer firm is represented here today by Mr. Stroube from Akin-Gump.

THE COURT: Mr. Stroube, perhaps you can --

MR. STROUBE: Good morning, Your Honor. I am Rey Stroube with Akin, Gump, Strauss, Haver and Feld here in Houston.

I got hired while I was in a hearing yesterday in Waco and maybe I am not totally up to snuff on this, but I believe the [sic] you talked to Mr. Becaso. I spoke to him yesterday afternoon late, I think, subsequent to your conversation.

My understanding is that the firm is representing, the Kaye-Scholer firm is representing this debtor, HBA East in the bankruptcy court in Eastern District of New York. They have

never made an appearance in this case on behalf of any party and that they have not served as an agent in this case to any extent.

THE COURT: Mr. Steinberg made an appearance here on the 29th.

MR. STROUBE: But not in representation of any of these defendants, Your Honor.

THE COURT: He participated in the motion hearing by telephone.

MR. MONTAGUE: Also, pleadings have been filed with this Court.

THE COURT: At no time did he disassociate himself.

MR. STROUBE: I understand there is one pleading where Kaye-Scholer is shown of counsel on that pleading, drafted by Mr. Caddell, and Mr. Caddell will tell the Court that was in error.

THE COURT: Why didn't Mr. Steinberg tell me it was in error when he participated about an hour last Wednesday?

MR. STROUBE: I don't know the answer to that, Your Honor. I haven't had an opportunity to talk to Mr. Steinberg.

Mr. Caddell could explain that.

MR. CADDELL: If I might respond to that. With respect to naming Mr. Steinberg of counsel, that was done

without his consultation. That was done simply as a matter of course in our office. Whenever we are contacted by someone from out of state

[4]

and asked to act as local counsel or file pleadings, we list them of counsel. My secretary did that.

I didn't confer with Mr. Steinberg particularly on the question of whether he should be listed as of counsel or not.

When he saw the pleading and he had been listed, he called me and asked that that be taken off the pleading. That was not his intent, and at that point this was -- as I say, on Tuesday they were withdrawn from any representation of the defendants as to Mr. Steinberg.

THE COURT: Which Tuesday are you talking about?

MR. CADDELL: Talking about three days ago, Judge, July 5th.

THE COURT: I am talking about Wednesday, June the 29th.

MR. CADDELL: I was fixing to respond to that.

With respect to his participation in a telephone call, Judge, when I get a call from a Federal Judge who wants to talk to me about anything, I talk to them. I don't tell him it's not any of my affair or I am not involved or anything like that.

I don't know that Mr. Steinberg stated that he did represent the defendants in that phone conversation. Of

course, I was not privy to it, but it did appear to me that he advised the Court of his firms possessory lien on that fund, which is in

[5]

itself an indication that their interest may not be aligned with those of the defendants.

THE COURT: First, that's not true because that meant every lawyer who ever acquired any property of a client over which they could assert a possessory interest would be in a conflict with their client, and so you would never have the ability to assert a possessory lien because as soon as you got something, you would have to quit representing them, and that is an irrational position.

Secondly, I don't know how long the hearing went on, but you were allowed twice to go off for extended periods and confer privately with Mr. Steinberg, and at no time did he suggest that -- he did say he had a possessory lien, but that rose by operation of law. It didn't take any assertion by Mr. Steinberg. He either has it or doesn't.

MR. CADDELL: Judge, I think it may be that the Court's order highlighted for Mr. Steinberg the problem that they have with that money because if the funds are transferred -- and we talked a little bit about this last Wednesday. I may not have articulated it very well, but funds transferred from New York to Texas, there is a grant of substantive relief or potential substantive relief to the defendants they are not otherwise entitled to.

There has been no evidentiary hearing on which to base that grant, and I am concerned there is no jurisdiction.

* * *

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* * *

the Court in those transcripts.

Also Mr. Levine admits that he owes Mrs. Abercrombie's companies, the plaintiffs in this case, in excess of amount held in escrow.

MR. CADDELL: Mr. Montague --

THE COURT: Wait. Wait. Wait.

MR. MONTAGUE: Nevertheless, Your Honor, they are still fighting over $175,000 of the entitlement thereto.

Mr. Levine even admitted on the stand on the bankruptcy court that he owes Mrs. Abercrombie far in excess of that amount.

Your Honor, I don't understand how these defendants have been allowed to go so long and abuse the Court system so badly in the number of ways that they have. There has got to be a stop to it.

We are here before this Court where a stop can be put, and that's why we filed our motion for contempt. There was open defiance of the Court's order.

Mr. Steinberg made an appearance before this Court, Your Honor, and it is absolutely absurd for Mr. Caddell to come in here and try to represent to this Court Mr. Steinberg made no appearance. He was on the pleadings. He talked to you on the telephone about the case in [sic] his representation to [sic] the defendants. I was sitting in the room when you talked to him.

I know that you made the assertion, Mr. Steinberg,

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well, you represent these defendants. I don't know what Mr. Steinberg said in response, but I think Your Honor would know if Mr. Steinberg said, no, I don't represent these defendants.

Your Honor, it's very peculiar that Mr. Steinberg is now instructing Mr. Caddell, on July the 5th, almost a week after we had the hearing on the petition for removal before this Court that, wait a minute, maybe I shouldn't be named as counsel in this case because it may be construed as an appearance in this case as representing the defendants in this case and maybe that order issued on June 29th does bind me and my law firm.

THE COURT: Even if he had withdrawn from representing these defendants at noon on the 29th and had just forgotten to mention that that afternoon, he still holds the funds as a de facto agent. Whether he is an attorney of record or any of those kinds of things, he held the funds in an escrow deposit on the 29th as an agent or some related party to the defendants.

Mr. Caddell.

MR. CADDELL: I am concerned that what we're doing here is getting caught up in what may or may not be the equities of the situation, and I have argued the equities and am prepared to do so, but I'm concerned that we're ignoring the law and the concepts of jurisdiction and authority, and while Mr. Montague has been, apparently, well-versed on New York lien law, and if it is as he says, then there should be a Rule 11 motion filed in Federal District Court in The Southern District of New York with

* * *

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* * *

transcript -- my clients were prepared to go forward and it was the plaintiffs --

THE COURT: They're under no duty, Mr. Caddell, to go forward with an adversary action in a bad faith bankruptcy. they had every right, in fact, a duty to get the entire bankruptcy dismissed. They do not have to play in your minacious forum.

MR. CADDELL: I agree with that, Judge, but the point --

THE COURT: Then when they get remanded, after spending huge sums of money getting that bankruptcy dismissed, they set a hearing, you set a hearing in state court.

MR. CADDELL: No, Your Honor.

THE COURT: Who set the hearing? They set the hearing?

MR. CADDELL: I never received notice a hearing was set. I don't know that one was set. That's just Mr. Montague's representation. I have never seen a piece of paper or seen any indication. In fact, I have spoken with Judge Salazar. He didn't know a hearing had been set.

MR. MONTAGUE: That's an affirmative misrepresentation to this Court.

THE COURT: Even if that's true, something motivated Kaye-Scholer to get you to remove the action.

MR. CADDELL: It had nothing to do with any hearing or notice of hearing or anything else.

* * *

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* * *

understand it.

MR. MONTAGUE: On the reasonable and necessary attorneys' fees, Your Honor, the reasonable and necessary attorney's fees up to this date were 15,680, which Mr. Caddell agreed to before we left the hearing this morning, and I understand from Ms. McDonnell that that's correct.

We have incurred an additional 1,475 due to having to appear today in the courtroom, and I would ask for those, too, in addition to the 15,680.

THE COURT: Now, what's the 15,000?

MR. MONTAGUE: That's the reasonable and necessary attorneys' fees that are sanctions, Your Honor, pursuant to Rule 11, which I requested in my motion filed with the Court on July 1st, as I recall, contempt motion.

Mr. Caddell has agreed to the $15,680 amount.

MS. McDONNELL: Your Honor, if I may respond.

We have agreed not to argue with what were reasonable and necessary fees as far as V & E's fees in this case; however, we do feel that as far as sanctions being imposed in this case for failure on Mr. Levine's part and the defendant's part as to bring the money to the registry

of the Court that the sanctions as far as Rule 11 should not be applied in the sense that Mr. Levine seriously did not have control over those funds.

He was not able without Kaye-Scholer's consent,

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due to a possessory lien, to remove those funds from the account. In fact, the account was in the name of Kaye-Scholer.

THE COURT: I am sorry. You missed the fun part this morning.

MS. McDONNELL: I realize that.

It's just as far as, merely as far as sanctions are concerned, we literally did not have the power to do so.

THE COURT: Kaye-Scholer, he is responsible for depositing -- I mean, if he had given it to Manfactures Hanover and they wouldn't give it back to him, that's his problem. That's not the court or the other side's problem, but the 15,000, is that for the removal and everything?

MR. MONTAGUE: Yes, sir. That's for the removal and up to this point in time in this action.

THE COURT: I am inclined to give you the $150 for the cost of this proceeding, but I think the 15,000 ought to go with the underlying case.

MR. MONTAGUE: Well, Your Honor, in order to come before this Court, there were attorneys' fees, significant attorneys' fees incurred, which we have asked for, pursuant to Rule 11 when we were over here in the first instance, as you will recall. We are again reurging --

THE COURT: I don't recall that, but I will take your word for it.

MR. MONTAGUE: Well, the pleading is on file with the

* * *

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* * *

We went over that again this morning, but I think I'm being fairly modest with the attorneys' fees.

MR. MONTAGUE: One more bit of clarification, Your Honor. There are three clusters here of people.

Is it the Court's order, the Court's ruling that each of the three clusters pay $1,250?

THE COURT: It's $2500. I take her clients to be the clients in the real action, the underlying action. Mr. Stroube is representing the intervening offer. I am assessing it half between them.

What's the third cluster?

MR. MONTAGUE: The third cluster is the law firm of Caddell and whatever it is.

MS. McDONNELL: Caddell & Conwell.

MR. MONTAGUE: Caddell & Conwell.

THE COURT: Why would I assess them?

MR. MONTAGUE: Because, Your Honor, they appeared here signing pleadings under Rule 11 opposing

the contempt motion, fighting what we're here, the very basis of what you are ordering attorneys' fees to be paid in this action, making all these sworn affidavits contesting what we've been doing. That's what Rule 11 is all about, as I understand it. Rule 11 really goes to the lawyers as opposed to the parties.

THE COURT: I understand, and I don't like it.

Mr. Caddell and Mr. Stroube appeared here and

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vigorously represented their clients. They lost the argument. Their clients are going to have to pay part of your attorneys' fees.

Other than not stopping when I asked them to, nobody, I think, stepped out of bounds, and Mr. Caddell was more tenacious than I would have been under the circumstances, but I am not sure that's his fault but the lawyers of whom the Court has developed a fairly skeptical view are Mr. Stroube's clients, but I am not going to punish Akin-Gump for representing a bunch of New York lawyers who apparently don't take orders seriously. They should be punished and not Mr. Stroube or his firm

MR. MONTAGUE: No, sir. I am not asking Mr. Stroube or his firm to be punished.

THE COURT: Mr. Caddell was, essentially, as I appreciate following the referring counsel's instructions, and he represented the position, as defective as it was, as best he could without being -- I think he was not obsteporous or particularly intransigent.

MR. MONTAGUE: Just doing what Mr. Steinberg told him to do.

THE COURT: That's a problem that --

MR. MONTAGUE: You pulled the trigger on the gun, Mr. Conwell. I will show you who to point it at

THE COURT: There is some truth to that, but as a lawyer who frequently has gotten things referred to them,

* * *

[Certification]

* * *

CERTIFICATION

I, FRED WARNER, Official Court Reporter for the United States District Court for the Southern District of Texas, Houston Division, do hereby certify that the foregoing pages 1 through 58 are a true and complete transcript of the proceedings had in the aboved-styled and numbered cause before the Honorable LYNN N. HUGHES, United States District Judge, on the 8th day of July, 1988.

WITNESS MY OFFICIAL HAND at my office in Houston, Harris County, Texas on this the 11th day of July, A.D., 1988.

/s/ Fred Warner

Fred Warner, CSR

Official Court Reporter

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEA BOXING COMPANY, INC., et al	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	C.A. NO. H-88-2214
	§	
HBA EAST, LTD., et al.	§	
	§	
Defendants.	§	

RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Production, Inc. and Jeffrey D. Levine, Defendants in the above-entitled and numbered cause of action and makes this their Response to the Court's Order to Show Cause why they should not be held in contempt of court for failure to comply with this Court's June 29, 1908, Order and would show as follows:

I.

The Escrow Account

1.1 On June 29, 1988, this Court signed an order that $175,000.00 of escrowed funds (the "Escrowed Funds") in Adversary Proceeding No. 187-0086, JEA Boxing Company. Inc.. et al v. HBA East. Inc.. et al, In the United States Bankruptcy Court of the Eastern District of New York (the "Bankruptcy Proceedings"), be deposited immediately into this Court's Registry.

1.2 The Escrowed Funds referenced in the June 29th Order were held on that date in a joint escrow account in the name of Kaye, Scholer, Fierman, Hays & Handler ("Kaye, Scholer"), as counsel for the Debtors and Stroock, Stroock & Lavan as counsel for the Movants in the above-referenced bankruptcy proceeding.

1.3 The bankruptcy proceeding was dismissed by Judge Feller on June 3, 1988. At the time of the dismissal, Kaye, Scholer not only had possession of the Escrowed Funds but also had, under New York law, a possessory lien over the funds for their unpaid legal fees.

1.4 At all times pertinent to this litigation, Kaye, Scholer has had a possessory lien over substantially all of the Escrowed Funds.

II.

The Possessory Lien

2.1 At no time have any of the Defendants regained possession of the Escrowed Funds. At the time the bankruptcy proceeding was dismissed, Defendant, Jeffrey D. Levine was informed by Kate Scholer that the firm's possessory lien over the Escrowed Funds was then in effect and that they would retain possession. The status of the possessory lien has remained unchanged. An affidavit by Jeffrey D. Levine describing in detail the facts underlying the Escrow Account is attached hereto as Exhibit "A", and incorporated herein for all purposes.

2.2 At the time this Court entered its June 29th Order requiring $175,000.00 of the Escrowed Funds deposited into the Court's Registry, such funds remained in the sole possession and control of Kaye, Scholer under their possessory lien. The Defendants in the above-

entitled cause of action are therefore unable to transfer the requested $175,000.00 from the Escrow Account.

III.

Interpleader Action

3.1 On July 1, 1988, Kaye, Scholer filed a Complaint in the United States District Court of the Southern District of New York for the purpose of interpleading the Escrowed Funds in their possession and control. A copy of the Complaint for Interpleader is attached hereto as Exhibit "B", and incorporated herein for all purposes.

3.2 Kaye, Scholer's interpleader action works to satisfy the intent of the Court's June 29th Order in that the $175,000.00 referred to in that order is presently within the control of a Federal District Court, and will remain there pending a resolution of the disagreement between the parties to this lawsuit.

3.3 As per the intent of this Court, the $175,000.00 in question will be protected until the resolution of the present cause of action.

IV.

Lack of Federal Jurisdiction

4.1 The attempted removal of this action was based upon diversity of citizenship under Title 28 U.S.C. 1 1441. When such an attempted removal occurs, the District Court's jurisdiction is limited to a determination of its own jurisdiction and the power to remand the action to the State Court if it appears that the action was removed improvidently and without jurisdiction. Smith v. Dealers Transit Inc., 239 F.Supp. 605 (E.D. N.D. Tenn. 1965). In

the Smith case, the Court held, on facts similar to our own, that since the necessary allegations as to diversity of citizenship between the parties did not appear from the respective records before the Court, that the Court had no jurisdiction to take any action other than a remand of the case back to State Court. Smith at 607.

4.2 In an earlier opinion, a South Carolina District Court held that:

> Unless the case has been properly removed, this Court has no jurisdiction to decide other questions.

Hensley v. Green, 36 F.Supp. 671, 672 (W.D. S.C. 1940).

4.3 Essentially, a District Court can not gain jurisdiction over an action unless there is some basis under 28 U.S.C. §§ 1441-1452. There is no basis in this case for Federal jurisdiction under the appropriate sections. Therefore, the Court's only power is to remand the case for determination in the appropriate forum. It is beyond the jurisdictional powers of this Court to enter an order for the transfer of funds because such an order is beyond the scope of its narrow jurisdictional power to remand a case upon which no Federal jurisdiction lies.

WHEREFORE, PREMISES CONSIDERED, Defendants Jeffrey D. Levine, HBA East, Inc. Ring Network, Inc., Ring Sports Promotions, Inc. and Round One Productions, Inc. respectfully request this Court to

find them not in contempt of Court for failure to comply with the Court's June 29, 1988, Order.

Respectfully submitted,

CADDELL & CONWELL

By: /s/Michael A. Caddell
Michael A. Caddell
Federal ID No. 7426

Leslie McDonnell
Federal ID No. 9136

The Park in Houston Center
1331 Lamar, Suite 1070
Houston, Texas 77010
(713) 751-0400

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Show Cause Order has been forwarded to all counsel of record via certified mail, return receipt requested, on this 7th day of July, 1988.

/s/ Leslie McDonnell
Leslie McDonnell

17LM.11

APPENDIX Q

NO. 87-010167

JEA BOXING COMPANY, INC., AND PINE HILL INVESTMENTS, INC. d/b/a HOUSTON BOXING ASSOCIATION	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	157TH JUDICIAL DISTRICT

PLAINTIFFS' FIRST AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW the Plaintiffs, JEA Boxing Company, Inc. ("JEA Boxing") and Pine Hill Investments, Inc. ("Pine Hill"), and bring this cause of action against the Defendants, HBA East, Ltd., a Texas Limited Partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine. In support of this action, the Plaintiffs would show this Honorable Court and jury the following:

I.

The Plaintiff, JEA Boxing Company, Inc., is a Texas corporation duly authorized to conduct business within Texas, and maintains its principal place of business in Houston, Harris County, Texas.

The Plaintiff, Pine Hill Investments, Inc. d/b/a Houston Boxing Association, is a Texas corporation duly authorized to conduct business within Texas, and maintains its principal place of business in Houston, Harris County, Texas.

The Defendant, HBA East, Ltd., is a Texas Limited Partnership duly authorized to conduct business within Texas. At the time the Original Petition was filed in this action, HBA East, Ltd. maintained its principal place of business in Garden City, New York. HBA East, Ltd. has conducted business in Texas since its effective date of existence in January, 1985 until on or about March, 1987, through and at the substantial direction of HBA East, Inc., acting during that time period as Managing Partner. HBA East, Ltd. has been served with process.

The Defendant, HBA East, Inc., ostensibly is a New York corporation duly authorized to conduct business within Texas, and maintains its principal place of business in Garden City, New York. Since its incorporation, HBA East, Inc. has regularly conducted business in Texas, primarily in Harris County, Texas, through its president and sole shareholder, Jeffrey D. Levine. HBA East, Inc. has been served with process.

The Defendant, Ring Network, Inc., ostensibly is a New York Corporation and does not maintain an office or regular place of business in Texas and, thus, does not have a registered agent for service of process in Texas. However, Ring Network has entered into contracts with

residents of Texas to be performed in whole or in part in Harris County, Texas, which contracts are involved in this action. Accordingly, Ring Network has appointed the Secretary of State of Texas as an agent to accept service of process in its behalf. Copies of Plaintiffs' Original Petition have been forwarded to Ring Network, Inc. in care of Jeffrey D. Levine, 585 Stewart Avenue, Garden City, New York 11530.

The Defendant, Ring Sports Promotions, Inc., ostensibly is a New York corporation and does not maintain an office or regular place of business in Texas and, thus, does not have a registered agent for service of process in Texas. However, Ring sports Promotions has entered into contracts with residents of Texas to be performed in whole or in part in Harris County, Texas, which contracts are involved in this cause of action. Accordingly, Ring Sports Promotions, Inc., has appointed the Secretary of State of Texas as agent to accept service of process in its behalf. Copies of Plaintiffs' Original Petition have been forwarded to Ring Sports Promotions, Inc., in care of Jeffrey D. Levine, 585 Stewart Avenue, Garden City, New York 11530.

The Defendant, Round One Productions, Inc., ostensibly is a New York corporation and does not maintain an office or regular place of business in the State of Texas and, thus, does not have a registered agent for service of process in Texas. However, Round One Productions has entered into contracts with residents of Texas to be performed in whole or in part in Harris County, Texas, which contracts are involved in this action. Accordingly, Round One Productions has appointed the Secretary of State of Texas as its agent to accept service of process in its behalf. Copies of Plaintiffs' Original Petition have been forwarded to Round One Productions, Inc. in care of Jeffrey D. Levine, 585 Stewart Avenue, Garden City, New York 11530.

The Defendant, Jeffrey D. Levine, is a resident of the State of New York. However, Levine regularly conducts business in Houston, Harris County, Texas, individually and in the name of the corporate defendants named above, which corporate defendants are merely the alter ego of Levine. Accordingly, Levine has appointed the Secretary of State of Texas as his agent to accept service of process in his behalf. Copies of the Plaintiffs' Original Petition have been forwarded to Jeffrey D. Levine at 585 Stewart Avenue, Garden City, New York 11530.

Each of the Defendants named above have been served with process and an appearance has been made on behalf of Defendants, HBA East, Inc., Round One Productions, Inc., and Jeffrey D. Levine, by the law firm of Kaye, Scholer, Fierman, Hays & Handler, as is evidenced in the paper filed with the Court on or about June 14, 1988, a true and correct copy of which is attached as Exhibit "C". No appearance has been made by Ring Network, Inc. or Ring Sports Promotions, Inc.

II.

In the latter part of 1984, Jeffrey D. Levine traveled to Houston, Texas, to meet with Pine Hill in an effort to convince it to enter into a partnership arrangement with him or, alternatively, a corporation over which he exercised control. The proposed partnership's purpose was to promote boxing events in New York and New Jersey and in such other places as agreed upon by the partners. At this meeting, Levine, acting in his individual capacity and as corporate representative of Ring Network, Inc., Ring Sports Promotions, Inc., and Round One Productions, Inc., made various representations, which have later proved to be false, as a material inducement to get Pine Hill to enter into this partnership arrangement. Believing all of that which it was told at this meeting by

Levine to be true, Pine Hill agreed to the partnership arrangement and began spending time and money to put the partnership together. Pine Hill would not have entered into this partnership arrangement if it had known of the falsity of Levine's representations. These false representations have substantially damaged Pine Hill.

III.

In December, 1984, Levine formed the Defendant, HBA East, Inc., to act as a general partner in the partnership with Pine Hill. Although Levine has acted in the corporate name of HBA East, Inc. in promoting various boxing events and in other related activities, Levine has never preserved the corporate character of HBA East, Inc. HBA East, Inc. is merely the alter ego of Levine. Levine and HBA East, Inc. are used interchangeably throughout this pleading. Where one of these parties is named, the allegations are meant to extend to each.

IV.

Effective January 31, 1985, HBA East, Inc. and Pine Hill entered into a limited partnership agreement to promote boxing events in the name of HBA East, Ltd., a Texas limited partnership. A true and correct certified copy of the Limited Partnership Agreement creating HBA East, Ltd. is attached hereto and made a part hereof as Exhibit "A". This limited partnership agreement was later amended to admit the Plaintiff, JEA Boxing, as a second general partner and to name the Defendant, HBA East, Inc., as the Managing Partner of the Limited Partnership. A true and correct certified copy of the amended limited partnership agreement is attached hereto and made a part hereof as Exhibit "B". However, even before the creation of HBA East, Ltd., it was agreed between Pine Hill and HBA East, Inc. that their partnership relationship would

be conducted substantially in accordance with the same terms and conditions later memorialized in the limited partnership agreements.

V.

As Managing Partner of HBA East, Ltd., HBA East, Inc. is restricted from engaging in any business activity in competition with the business and activities of HBA East, Ltd. or that would in any way be detrimental to the partnership or constitute a partnership opportunity. Thus, all business transactions in which HBA East, Inc. has participated in the field of boxing promotions since January, 1985, are for the benefit and belong solely to HBA East, Ltd. Not only was this agreement contained in the limited partnership agreements attached hereto, this agreement was also the agreement among all the parties to this action even before the limited partnership was created. It has now been discovered that HBA East, Inc. has acted in breach of both its contractual agreement and its fiduciary relationship established between the parties to this action, the result of which is great and has substantially damaged the Plaintiffs.

VI.

At the requests of HBA East, Inc., Pine Hill has repeatedly sent substantial sums of money in excess of $1.1 million to HBA East, Inc. in order to fund the promotion of various boxing events and to generate revenues for the benefit of the limited partnership since January, 1985. The limited partnership agreement requires HBA East, Inc., as Managing Partner of the limited partnership, to account for all moneys received and expended by the limited partnership as well as to account for and to keep the other partners informed of all contracts, business opportunities, and other advantageous business relationships established for the partnership's benefit.

VII.

Further, the limited partnership agreement provides that all monies advanced to the limited partnership by Pine Hill will first be paid out of the profits generated by the partnership before any profits are paid out to the partners. Although over $1.1 million has been advanced by Pine Hill to HBA East, Inc. for the benefit of the partnership, none of this money has been repaid. The Plaintiffs have made repeated requests to HBA East, Inc., through Levine, to provide an accounting and other reporting of the monies he has received that belong to the limited partnership, however, HBA East, Inc. has repeatedly and adamantly refused to make such an accounting. It has now been discovered that the funds that were forwarded by Pine Hill to HBA East, Inc. have been commingled in other accounts and have been used for the own self-dealing of HBA East, Inc., Levine, and other corporations and business entities over which Levine maintains control in breach of HBA East, Inc.'s contractual relationship with and fiduciary obligations owed to the Plaintiffs. Further, HBA East, Inc.'s actions and that of Levine's in this regard amount to a fraud practiced on the Plaintiffs. This conduct has caused substantial damage to the Plaintiffs.

VIII.

HBA East, Inc. is contractually obligated by the limited partnership agreements to allow each of the other partners a reasonable opportunity to inspect, copy, and audit all books, records, contracts, and other documents that affect the partnership's business. The Plaintiffs have made repeated requests to HBA East, Inc. to examine these documents to determine the financial posture of the partnership's business as well as all business opportunities that may affect the business. HBA East, Inc. has

repeatedly refused the Plaintiffs the opportunity to make this investigation although it has on numerous occasions recognized the Plaintiffs' right to do so. This conduct constitutes a breach of the contractual agreement HBA East, Inc. has with the Plaintiffs as well as the fiduciary obligations owed to the Plaintiffs. In an effort to achieve justice for the Plaintiffs so that they may determine the exact amounts owed them by the Defendants and, further, to discover the extent of the fraud and misrepresentations practiced on them, it is necessary that the Court require that the Defendants produce books, records, accounting ledger, files, bank account statements, audit statements, income tax returns and all other documents that may have a bearing, directly or indirectly, on the financial condition of the Defendants and their past financial affairs since 1984.

IX.

HBA East, Inc. has breached its agreement with the Plaintiffs in their partnership arrangement with them by self-dealing for its own benefit through Levine. HBA East, Inc. has solely used the more than $1.1 million in funds forwarded to it that were to be used for the benefit of the limited partnership to generate profits that he has retained for himself and the corporate defendants he controls. HBA East, Inc. has made boxing promotion and other contracts in its own name solely for its own benefit when those contracts should have been made in the name of HBA East, Ltd. for the benefit of all partners in the partnership. First, boxing promotion contracts with various fighters such as Tony Tucker, Carl Williams, Vincent Burgese, Roger Mayweather, Tony Martin, and Hector Camacho were made in the name of HBA East, Inc. (or in Levine's name individually or in the name of one of his corporate alter egos) with no intention of letting the Plaintiffs, as partners, receive their rightful share of and benefits from those contracts. Second, HBA East, Inc.

has made contracts with various hotels in Atlantic City. New Jersey, and other cities in its own name and for its own benefit substantially relying on the funding and contacts of the Plaintiffs, as partners, to secure these contracts. Third, HBA East, Inc. has made contracts with Madison Square Garden in its own name and for its own benefit substantially relying upon the funding and contacts of the Plaintiffs, as partners, to secure these contracts. Fourth, HBA East, Inc. has made contracts with various television networks and video reproduction companies in its own name and for its own benefit substantially relying upon the funding and contacts of the Plaintiffs, as partners, to secure these contracts. Never did HBA East, Inc. inform the Plaintiffs that these contracts were being made in its own name; to the contrary, it repeatedly misled the Plaintiffs into believing the contracts were made in the partnership's name and/or for its benefit. However, HBA East, Inc. now disavows the existence of any type of partnership arrangement with the Plaintiffs whatsoever and refuses to allow the Plaintiffs to receive their rightful share of the benefits of each of these contracts, business opportunities, and advantageous business relationships which are in excess of $1 million. This conduct amounts not only to a breach of its contractual arrangement with the Plaintiffs but also fraud. The Plaintiffs have suffered substantial damages by reason of the Defendants' conduct in this regard.

X.

All of the contracts, potential contracts, business opportunities, and advantageous business relationships made by HBA East, Inc. (or by Levine individually or in the name of one of his corporate alter egos) with fighters, hotels, television networks, video companies, and other groups and corporations connected, directly or indirectly, to promotion or boxing events belong to and are the sole property of the partnership, whether it be found to be a

general or limited partnership. HBA East, Inc., nevertheless, has received all of the revenues from these contracts and used them solely for its own personal benefit and for the benefit of Levine. Not only is this a breach of the limited partnership agreement, it is a breach of the fiduciary responsibilities HBA East, Inc. and Levine owe to the Plaintiffs. The Defendants' conduct in this regard has caused the Plaintiffs substantial damage.

XI.

All contracts made and business opportunities developed by the Defendants since January, 1985, are the property of HBA East, Ltd. These include promotional contracts with boxers, hotels, casinos, television networks, video production companies, and various other corporations and business entities. Nevertheless, the Defendants have tortiously interfered with those contracts to the disadvantage of the partnership and, more particularly, the Plaintiffs' investment in the partnership. The Plaintiffs by reason of this interference have suffered significant damages, and if this conduct continues, will suffer further damages.

XII.

HBA East, Inc. and HBA East, Ltd. conspired to breach their contractual and fiduciary obligations owed to the Plaintiffs as stated above for the ultimate benefit of HBA East, Inc. and Levine. This conspiratorial conduct has caused and continues to cause the Plaintiffs significant damages.

XIII.

It is necessary that a receiver be appointed to take possession of and responsibility for the assets of HBA East, Ltd., HBA East, Inc., Ring Network, Inc., Ring Sports

Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine; to manage and operate the partnership business established between the parties to this action; to collect accounts receivable; to keep a true, complete, and accurate record of the receipts of the partnership business; to pay all approved creditors of the partnership; and to pay to Plaintiffs all sums due under the partnership agreement. If a receiver is not appointed, because of the Defendants conduct stated hereinabove, the partnership business and the assets thereof are in danger of being taken, removed, materially injured, or destroyed by persons who have no right to compromise the value of those assets to the Plaintiffs' detriment.

XIV.

By virtue of the wrongful actions taken by the Defendants in the past and the irreparable harm that will occur in the future if these actions were allowed to proceed as before, the Plaintiffs request that this Court enjoin the Defendants from transferring any of the assets possessed by HBA East, Inc., Ring_Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., or Levine, unless transferred directly to the Plaintiffs, to the Court's Registry, to a receiver appointed by the Court, or to one agreed upon among the parties to this action.

XV.

By virtue of the misappropriations of funds and fraudulent misrepresentations made by the Defendants, the Plaintiffs are entitled to recover and seek to recover in this action punitive damages to deter the Defendants from engaging in similar activities in the future and to provide an example to others who may seek to engage in the same egregious conduct as the Defendants have in this cause.

XVI.

On or about March 27, 1987, the Defendants, Jeffrey D. Levine, HBA East, Inc., and Round One Productions, Inc., filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of New York solely to avoid the jurisdiction of this Court over the matters raised in this action. The Defendants' intent by filing bankruptcy was solely to remove this action from the courts of this State to the courts in Brooklyn, New York, in an effort to defeat the contractual obligations owed the Plaintiffs. The filing of the bankruptcy action automatically stayed the action in this Court by reason of the operation of Section 362 of the United States Bankruptcy Code. 11 U.S.C. §362. In response, the Plaintiffs' filed an action to dismiss this bankruptcy action for the reason that it was filed in bad faith solely to avoid the jurisdiction of the Texas courts. On June 3, 1988, the United States Bankruptcy Court held that the Defendants Levine, HBA East, Inc., and Round One Productions, Inc. wrongfully used the bankruptcy courts to avoid the Texas state court action, filing their Chapter 11 bankruptcy petition in bad faith. The bankruptcy court ordered that their Chapter 11 actions be dismissed for those reasons. A true and correct copy of the bankruptcy court's decision and order is attached hereto as Exhibit "D".

XVII.

During the pendency of the Plaintiff's Motion to Dismiss the Defendants' bankruptcy actions, one of the boxers promoted by HBA East, Ltd. fought, reaping the partnership substantial profits. In the Bankruptcy courts' chambers, the Defendants' attorneys, Kaye, Scholer, Fierman, Hays & Handler, agreed to deposit into its firm escrow account $175,000 of these profits to be held until the Bankruptcy Court decided to whom these profits

belonged if the Court first found that the bankruptcy action was properly before it. As a consequence of the Bankruptcy Court's dismissal of the bankruptcy action, it will lose jurisdiction to direct the manner in which the amount held in the escrow account, will be disposed. Therefore, the $175,000 held in escrow by the Defendants' attorneys may be returned to the Defendants for whatever disposition the Defendants desire even though none of that amount belongs to the Defendants if a mandatory injunction is not issued immediately by this Court directing that the escrowed amount be paid into this Court's Registry.

XVIII.

On June 23, 1988, the bankruptcy court ordered in open court that the escrow arrangement be dissolved on Wednesday, June 29, 1988 at 5:00 p.m. and that the escrow agent be authorized at that time to turn the escrow funds over to Defendants. The bankruptcy Judge delayed the effective date of the order until Wednesday, June 29, 1988 at 5:00 p.m. for the express 9urpose of providing counsel for the Plaintiffs time to seek a restraining order in this action requiring the funds to be paid into this Court's Registry.

XIX.

The Defendants, by filing the bankruptcy action, have taken the position that they are insolvent and have little if any money to operate and function. If the escrow funds are released to the Defendants it is very probable that the Plaintiffs will never be able to recover this money to which they area entitled. Therefore, it is necessary that an immediate Temporary Restraining Order be issued without notice to the Defendants, requiring the Defendants to instruct their attorneys, agents, and any other persons acting in their behalf, to pay into the Registry of the

District Court of Harris County immediately the $175,000.00 held in escrow by Kaye, Scholer, Fierman, Hays & Handler, including all interest accumulated on the same; and, further, to require Kaye, Scholer, Fierman, Hays & Handler to deposit in the Registry of this Court the $175,000.00 escrowed amount irrespective of the instructions received by the Defendants.

XX.

Further, the Plaintiffs are entitled to a temporary injunction requiring the Defendants and their attorneys, agents, and other persons acting for or in their behalf to keep on deposit in the Court's Registry the $175,000.00, plus interest accumulated thereon, until it is determined finally to whom this money shall be paid.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs, JEA Boxing Company, Inc. and Pine Hill Investments, Inc., pray that the Defendants, HBA East, Ltd., a Texas Limited Partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine, having been summoned and required to answer the Plaintiffs' Original Petition recover their damages from the Defendants arising out of the above enumerated contractual breaches and fraud practiced on the Plaintiffs jointly and severally from the Defendants; that the Plaintiffs receive all of their rightful interests in various promotional contracts made in the name of any one of the Defendants; that the Defendants account to the Plaintiffs in full for the expenditures of funds in the operation of HBA East, Ltd. and HBA East, Inc.; that the Plaintiffs, recover all monies funded by Pine Hill to the partnership through Levine and HBA East, Inc.; that the Plaintiffs recover all consequential damages sustained by them by reason of the Defendants' breaches of contract and fraud practiced on the Plaintiffs; that Plaintiffs recover all lost profits that

they have sustained by reason of the Defendants' breaches of contract and fraud; that Plaintiffs recover punitive damages from the Defendants; that Plaintiffs recover prejudgment and post-judgment interest from the Defendants in the maximum amount provided by law; that the Plaintiffs be granted the injunctive relief pled for hereinabove; and that the Plaintiffs recover all costs of court and have such other and further relief to which they may be justly entitled.

Respectfully submitted,

VINSON & ELKINS

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THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned Notary Public, on this day personally appeared H. Dixon Montague, who being by me duly sworn on his oath deposed and said that he is the attorney for Plaintiffs in the above-entitled numbered cause; that he has read the above and foregoing Plaintiffs' First Amended Petition and that every statement contained therein is within his personal knowledge and true and correct.

/s/ H. Dixon Montague
H. Dixon Montague

SUBSCRIBED AND SWORN TO BEFORE ME, on the 29th day of June, 1988 to certify which witness my hand and official seal.

/s/ Marianne Guzman
Notary Public in and for
the State of Texas

My Commissions Expires:
July 28, 1988

CERTIFICATE OF SERVICE

This is to certify that on this the 29th day of June, 1988 a true and correct copy of the above and foregoing Plaintiffs' First Amended Petition was delivered by messenger to Mr. Michael A. Caddell, Caddell & Conwell, 1331 Lamar, Suite 1070, The Park in Houston Center, Houston, Texas 77010-3027; and by federal express mail to Mr. Arthur Steinberg, Kaye, Scholer, Fierman, Hays & Handler, 425 Park Avenue, New York, New York 10022

/s/ H. Dixon Montague
H. Dixon Montague